



Report on the relations between manufacturers and retailers in the food sector



Report on the relations between manufacturers and retailers in the food sector

Contents

Report on the relations between manufacturers and retailers in the food sector

Executive summary	4
1. Introduction	10
2. Grocery retailing in Spain	14
2.1. Concentration in grocery retailing	17
2.2. Retailing formats	28
2.3. Retailer own brands	34
2.4. The bargaining power of retailers	56
3. Commercial practices in retailing	76
3.1. Context	77
3.2. Analysis of commercial practices not based on prices	78
3.3. Competition risks posed by each of the practices identified	84
3.4. Initiatives in other countries	114
4. Regulatory barriers in conditions for opening setting up and operating retail outlets	118
4.1. Analysis of the barriers of Department Sotres (DSs)	120
4.2. Effects of the barriers	127
5. Conclusions	130
6. Recommendations	138
Bibliography	142
Annex 1. Regional retail regulations	146
Index of graphs and tables	158

Executive summary



Retail distribution is the final link between manufacturers and consumers. Retailers perform an essential function for consumers. For one, they select, stock and store the goods produced. And second, they facilitate purchasing decisions by providing information on the goods sold.

As in other countries, food retailing in Spain has undergone a sweeping change in recent decades, which has been mainly characterised by the previous model based on the traditional commercial format being replaced by another one in which large-scale retailers have firmly established themselves and supermarkets and hypermarkets have achieved a clear predominance.

This transformation, moreover, has come in a particularly important sector of the Spanish economy, in which there is growing social concern over the consequences of the increasing bargaining power of retail distribution over operators in the rest of the food supply chain, specifically, in the last link, and over end consumers.

In its Resolution of 15 June 2010 in case S/0165/09, Gran Distribución Galicia, the Council of the CNC held that these issues required in-depth analysis from the standpoint of competition. Pursuant to the mandate set out by the Council in that decision, the CNC has carried out a study on the impact on competition in the market of the changes which have taken place in recent years, paying special attention to the development of retailers' brands.

The analysis underscores three main trends that have been driving the sector's evolution in Spain.

First, increased concentration of retailers. Nationally, the combined market share of the four biggest operators expanded from 48.7% in 2002 to 58.0% in 2009. At the regional level, concentration in food retailing has increased in most of the Autonomous Communities.

Second, the ever more important role of medium and large supermarkets versus other retail formats. Supermarkets are the dominant format at present, concentrating 47% of grocery purchases by households. In recent years, the growing importance of this commercial format, spurred by the restrictive nature of the law regulating the retail sector (Act 7/1996 of 15 January 1996; the Ley del Comercio Minorista, hereinafter LCM), has been accompanied by a decline in the role of traditional retailers, whose market share dropped from 35.6% in 1995 to 27.7% in 2009.

Third, the rise in the market share of retailer own brands (ROBs) from 22% in 2003 to 34% in 2009. This increase has been seen across practically all categories, although there are notable differences between products.

All of these factors, together with other trends that have also been characterising the sector's development in this period, such as the tendency toward vertical integration, the creation of group purchasing organisations and the heightened restrictiveness of commercial legislation beginning in the mid-1990s, have contributed to a sharp gain in the bargaining power of retailers versus manufacturers.

In the short-term, the increased bargaining power of major retailers may have a positive impact on social wellbeing, provided there is sufficient competition between them and retailers pass on to consumers all or part of the gains in the terms of trade obtained from their suppliers thanks to their greater bargaining power. In the long term, however, the implications of that bargaining power for society are ambiguous, as the positive effects may be wiped out by the risk of that greater power working to undermine both inter-brand competition between manufacturers and intra-brand competition between retailers, as well as undercutting the incentive and capacity of manufacturers to invest and innovate.


The development of the ROB plays an important role in this regard. The growth of ROBs can reduce competition between producers as those private labels gradually replace manufacturer brands (MBs). Although the introduction of ROBs in a category initially widens the range of choices available for the consumer, over time these brands tend to displace the weaker MBs, which also contributes to a relative strengthening of the leading manufacturer brands. In the long term this phenomenon may lead to product markets that have only one or a few leading MBs and a ROB for each retailer; in such scenarios the lessened intensity of **interbrand** competition would also be accompanied by less product variety and quality.

Furthermore, the better purchasing terms obtained by the large retailers can lower **intradbrand** competition by giving them a significant competitive edge over other retailers. That competitive advantage stems not just from the fact that some large retailers are able to buy their goods at lower prices than their rivals, but also because suppliers may find themselves forced to increase their prices for retailers with less or nil bargaining power in an effort to recoup the margin lost in offering the powerful retailers the discounts they demand. Both effects are compounded by the fact that the smaller retailers do not usually have the same capacity as the big retailers for developing their own brands. All of this may contribute in the long term to driving retailers with less bargaining power out of the market or, at least, to a notable weakening of their capacity to exert competitive pressure on the large retail chains.

Lastly, the greater bargaining power may reduce the capacity and incentives for suppliers to invest and innovate. If suppliers expect they will not be able to capture an adequate portion of the overall profits, they will have less incentive to spend on capacity and innovation, although the latter effect could be offset by the stimulus to differentiate their MBs from ROBs. In addition, if producers see their margins pinched by the increased bargaining power of retailers, they will have less resources available for investment and innovation.

The medium and long-term impact of retailers' higher bargaining power depends to a large extent on **how they exert that power and on the actual degree of competition between retailers**. The broader and more consistent the use by large retailers of certain commercial practices, and the lower the degree of competition in retailing, the higher the likelihood of anti-competitive consequences and harm in terms of consumer welfare.

Determining the characteristics and real impact of those commercial practices in Spain has therefore been a very important element of this Report, especially given that access to that information is confronted by major



The Report analyses the risks in terms of competition and the real impact in Spain of the most widespread commercial practices and of those that are potentially the most dangerous for competition.

obstacles. In particular, differences in bargaining power and the existence of individual situations in which certain suppliers are economically dependent on their retailers in the short term make it more difficult for the affected suppliers to oppose or eventually file complaints against situations that may be contrary to the laws and regulations on industrial property, unfair trading and competition.

Certain factors at work in Spain increase the risk that, in the long term, the negative effects of retailers' higher bargaining power on competition and welfare will outweigh the positive ones. The research which has been conducted confirms that certain commercial practices which are harmful in terms of competition are indeed being carried on simultaneously by the major retailers, and, also, the persistence of a series of legal restrictions on competition in the retail trade that hinder the entry of new operators with capacity to compete and limit the emergence of alternative distribution models.

The Report analyses the risks in terms of competition and the real impact in Spain of the most widespread commercial practices and of those that are potentially the most dangerous for competition. Of those practices, the ones that pose the biggest risks are commercial payments, the failure to establish contract terms and conditions in written form and retroactive contract variations that are neither agreed nor expected, the excessive anticipation with which retailers ask suppliers for information on certain characteristics of the products, the most favoured customer clauses and the requirement for suppliers to provide sensitive commercial information on the other retailers with which they work.

The higher bargaining power major retailers enjoy increases their capacity and incentives to use those commercial practices in the relations with their suppliers, which, in addition to allowing retailers to obtain supplies on terms which are unattainable by their competitors, also foster the development of retailer own brands. This generates a feedback effect and also contributes to a progressive reinforcement of the retailers' bargaining power, which gives rise to the negative effects which have been described above.

The second factor which may cause the increase in the bargaining power of large retailers in Spain to lead to a long-term reduction in economic welfare is the persistence of regulatory restrictions to the establishment and operation of certain types of retail businesses.

In the retail trade, the transposition of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market was done in Spain via Act 1/2010 of 1 March 2010, which reformed the LCM. This law eliminates, as a general rule, the requirement to obtain an authorisation to operate retail establishments and makes application of other enabling titles conditional on the existence of overriding requirements relating to the public interest in relation to the retail sector. Nevertheless, the

CNC has repeatedly denounced¹ that the authority attributed by that law to regional governments for establishing those authorisation systems has led to a de facto maintenance in most regions of the previous system of second commercial licences for the large department stores, as a result of the failure to adequately justify the necessity and proportionality of their commercial regulations in order to achieve those public interest objectives.

In addition to the regulation regarding the setting up of large department stores, there are other elements in the regional and municipal regulations which condition the establishment of large commercial outlets, in particular, those related to the urban planning of commercial areas. These restrictions are also accompanied by other regulatory provisions that limit the capacity of retailers to compete and are especially harmful to the large department stores. A prime example of this is the regulation of store hours and calendars for discounted retail sales and the blanket prohibition on selling at a loss.

These regulatory barriers condition the evolution of the food retail sector and limit the degree of competition, which limits growth in investment in new information technologies, productivity and sectoral employment and contributes to increasing retail prices. Furthermore, by reducing intrabrand competition and limiting the development of new retail business models, these legal restrictions reinforce the bargaining power of incumbent retailers and foster a widespread application of the commercial practices described above.

In fact, the regulatory restrictions in Spain, especially since the approval of the current law regulating the retail sector (the LCM), have contributed in large measure to creating a favourable context for the development of a retailing model where medium and large supermarkets are clearly predominant. This may have a negative long-term impact on product variety and product innovation. But, what is more, given that the supermarket format is a much closer competitor and potentially more dangerous for the survival of small shops and specialised stores, the result of all these rules is proving to be precisely the opposite of their intended objective of protecting the smaller retailers.

The CNC therefore believes that proper competitive functioning of this sector requires eliminating the regulatory barriers to the development of effective competition in retailing and establishing the right mechanisms for minimising the possible negative impact of certain commercial practices.

In order to foster competition in retailing, the CNC once again calls on the competent government authorities for these matters to remove the important legal restraints that still exist regarding the setting up and operating of large retail outlets, and to carry out a proper transposition of the Services Directive, eliminating all the elements of the regulatory framework for the retail sector and other areas (for example, town planning rules) that do not fulfil the principles of necessity, proportionality and least distortion. In particular, in relation to the establishment of such outlets, the power of regional governments to

¹ Without pretending to be exhaustive, we may cite the following: from the former Competition Tribunal, TDC (2003), Report on the conditions of competition in the retail sector (I 100/02), CNC (2009), Reforming the Retail Sector Regulatory Act in the context of the transposition of the Services Directive and CNC (2009), IPN 09/2009 reform of the retail sector act.

require an authorisation or any other kind of enabling title as a condition for setting up an outlet should be eliminated, in order to avoid the risks that a loose interpretation of the public interest objectives to which those restrictions must be subject will lead to a *de facto* maintenance of the double authorisation system. Regarding the legal restrictions which limit the ability to operate and compete, it is specifically recommended that the authorities eliminate regulations which restrict the right to freely determine store hours, openings on holidays and discount-sales calendars, as well as the general prohibition on selling at a loss.

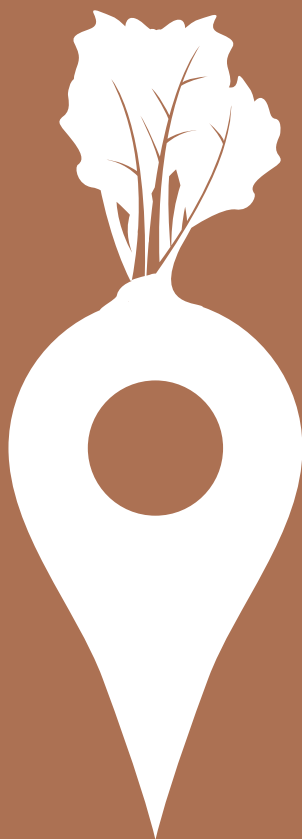
In relation to commercial practices between suppliers and retailers, there is a need for precise knowledge of the characteristics and the degree of incidence of the practices which are most likely to have harmful effects on competition and on the efficient functioning of the market. With this aim, it is recommended the establishment of mechanisms to enhance the possibilities of reporting those practices with minimal risk of reprisals against the complainant, engaging the large retailers in this task by having them collect and maintain the relevant information identified for each of the commercial practices considered as problematic. The sector associations of manufacturers and retailers can also be brought in on this task within the scope of their powers under the Unfair Competition Act.

The Report also puts forth specific recommendations for minimising the effects of the most problematic practices. Concretely, it recommends that commercial relations be formalised through written contracts and that limits be placed on retroactive modifications of contract terms and conditions, as well as ensuring the predictability and transparency of commercial payments and confining the scope of sensitive information required by a retailer to its relationship with the manufacturer, with timetables related to the launch of new products that are justified by the requirements proper to that commercial relationship. Furthermore, a warning is also issued to large retailers that certain practices, such as most favoured customer clauses or requesting manufacturers to provide sensitive commercial information on other retailers, are more likely to run afoul of competition rules.

Finally, the Report warns against the risk of a breakup of the internal domestic market as a result of the proliferation of different regulations and codes of conduct in the Autonomous Communities, as this could reduce the intensity of competition and undermine the efficiency and competitiveness of the Spanish food sector.

1.

Introduction



1

Introduction

During the last few decades, grocery retailing has undergone considerable transformation in response to a conjunction of economic, social and demographic changes such as the stepped-up entry of women in the labour force, a reduction in the amount of time households have for shopping and the increasing development of residential zones in suburban areas.

This process of change has been characterised by three main trends: greater concentration, growing importance of large retail outlets and shopping centres, and a notable expansion of retailer brands, which are carving out ever larger market shares. This last factor merits special attention given its capacity to modify both the competitive dynamic between retailers and their traditional function, which is no longer confined to distributing manufactured goods and is increasingly focusing on developing retailer own brands to compete on store shelves with the manufacturer brands.

As in other countries, the transformation of the retailing sector in Spain has contributed to a notable increase in the bargaining power of retailers vis-à-vis their suppliers, a power which, in the current market context, is exerted not just in the form of pressure to bring down wholesale prices from upstream manufacturers, but also through the use of certain commercial practices focused not on the price paid by the retailer to the supplier, but on other aspects of their commercial relationship. These practices are being analysed in several countries due to their possible negative effects on how the market functions and on the conditions of competition in both the near and long term.

In the international domain, many competition authorities are studying or have studied the retail sector and the vertical relations in the food supply chain. Notable amongst these is the research done by the British *Competition Commission* in April 2008, titled *The supply of groceries in the UK market investigation*. Countries such as the US, Australia, Romania, France and Sweden have also conducted comprehensive or specific topical research into the grocery retailing sector, and many others have embarked on similar analyses.² In the European Union, these issues have been the object of debate and analysis in several institutions, including the European Commission and Parliament, with emphasis on the need for competition authorities of the Member States to intensify their pursuit of coordinated action in this area. After the European Commission's publication in 2009 of its Communication *A better functioning food supply chain in Europe*, the High Level Group on the Competitiveness of the Agro-Food Industry, which reports to the Commission, created a European Forum composed of various agents from the food manufacturing and retail sectors. One of the Forum's aims was to determine the most problematic contractual practices in the commercial relationships within the food supply chain and to explore possible solutions.

² Section 3.4 of the Report gives an overview of the most recent international initiatives in this sector.

Acting along similar lines, in Spain the Observatory of Food Prices, presided over by the Ministry of Environmental, Rural and Marine Affairs, has been working over the last year to compile a list of best trade practices, with the participation of operators from the different links in the food supply chain. At the regional level, too, several initiatives have emerged in this area. Catalonia recently saw the signing of a code of best commercial practices in the groceries supply chain.³ In Extremadura⁴ and in the Comunidad de Valencia region⁵ other codification initiatives are under discussion.

The chief aim underlying all of these investigations is to respond to a certain social concern regarding the impact that the growing bargaining power of retailers is having on operators in the rest of the grocery supply chain, specifically in the last link, and on end consumers, both in the medium and long term. Nevertheless, in the case of Spain, attention also needs to be drawn to the possible negative effect that the strong expansion of retailer brands may be having on innovation. This was highlighted in the document released in April 2011 by the European Commission's Directorate General for Enterprise and Industry on *The impact of private labels on the competitiveness of the European food supply chain*.

The CNC has already taken up this general question, primarily in its Resolution of 15 June 2010 in case S/0165/09, Gran Distribución Galicia. In that decision, the CNC Council concluded that the competitive relations between producers and retailers arising as a result of the existence of private labels raised the need for an in-depth competition analysis of this issue. The purpose of this Report is, therefore, to carry out that analysis, paying special attention to certain commercial practices which, in the current context of the grocery retailing market in Spain, could have a negative effect on interbrand and intrabrand competition, as well as on innovation and the overall wellbeing of society as a whole and of consumers in particular.

Compiling the information needed to carry out this study required interviewing numerous agents, including representatives of farming associations and consumer groups, as well as industry, manufacturer and retailer organisations, in addition to the government authorities involved. This field work was completed by conducting a survey of manufacturers and retailers in Spain using a sampling of eight product categories: vegetable oils, waters, rice, breakfast cereals, fish conserves, milk, bakery goods and yoghourts. The selected sampling of categories allowed diverse situations to be considered as regards: level of penetration of retailer brands, pace of innovation, existence of "hidden giants", major national producers and regional impact.

3 On 28 July 2011 an agreement was reached, sponsored by the Government of Catalonia, on best commercial practices in the food supply chain, signed by various sector associations: Asociación de Cadenas Españolas de Supermercados (ACES), Asociación Española de Distribuidores, Autoservicios y Supermercados (ASEDAS), Asociación Nacional de Grandes Empresas de Distribución (ANGED), Consejo de las Empresas de Distribución y Autoservicio de Catalonia (CEDAC), Mercabarna, Micro, Pequeña y Mediana Empresa de Catalonia (PIMEC), Foro Interalimentario, Asociación Gremial de Empresarios Mayoristas de Frutas y Hortalizas de Barcelona y Provincia, Unió de Pagesos (UP) and Jóvenes Agricultores y Ganaderos de Catalonia (JARC).

4 Extremadura Al Día, 20.09.2011, *Monago takes up the 'Good Commercial Practices' agreement with representatives of the agro-food sector*.

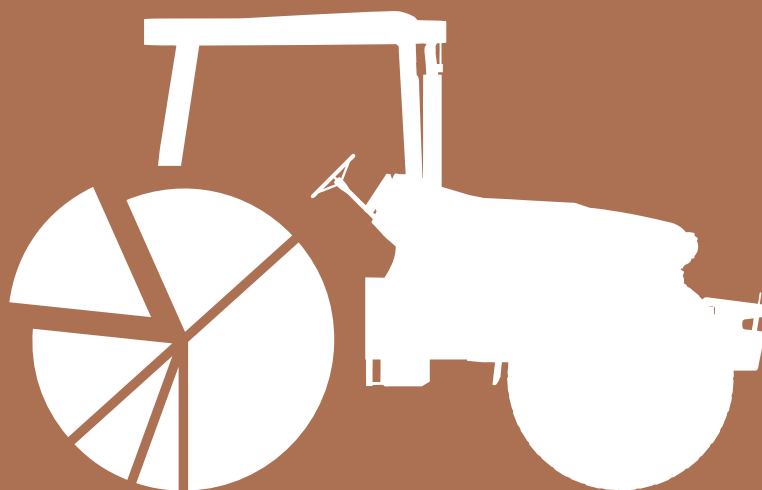
5 elperiodic.com, 11.05.2011, *Regional Council draws up code of good practices to improve management of agro-food supply chain and foster business cooperation*.

This Report is structured as follows. Section 2 provides an analysis of the retail sector, its market structure and the main factors driving the increase in the buying power of retailers vis-à-vis their suppliers in recent years. The focus of section 3 is a study of a series of commercial practices not based on price through which the major retailers exert their buyer power over suppliers, with an analysis of the risks they pose for competition. An analysis of regulatory barriers in retailing and their economic effects is given in section 4. Lastly, sections 5 and 6 set out a number of conclusions and recommendations.

The Report was approved on 5 October 2011 by the CNC Council pursuant to its consultative powers under article 26.1 of the Competition Act 15/2007 of 3 July 2007 (Ley Defensa de la Competencia; hereinafter, LDC). That provision lays down the duty of the CNC to foster the existence of effective competition in markets through actions to promote and perform studies and research into competition matters, to make proposals for liberalisation, deregulation or regulatory amendment and to issue reports on situations in which the application of laws and regulations give rise to obstacles to the maintenance of effective competition in markets.

2.

Grocery retailing in Spain



2.

Grocery retailing in Spain

Retail distribution is the final link between producers of goods and consumers. Retailers perform an essential function for consumers: they select, stock and store the goods produced, and facilitate purchasing decisions by providing buyers with information on the products sold.

Grocery retailing occupies a very important place in the Spanish economy. Overall spending on food and beverages amounted to 86,851 million euros in 2009, of which 64,911 million (74.7% of the total) was done by households, 19,342 million (22.3%) by hotels, restaurants, cafés and bars (referred to as the “horeca” channel) and 2,599 million (3%) by institutional buyers.⁶ According to the Survey of Household Budgets compiled by the Instituto Nacional de Estadística (Spanish Institute of Statistics — INE), spending on food products by households in 2009 absorbed 13.4% of their total annual expenditure, with average spending per household of 4,070 euros. As for employment, in 2010 the food distribution sector employed an average of 372,100 persons.⁷

In 2009 food retailing took up nearly 20% of the total retail selling area. In the period 2004-2009 the floor area used for grocery retailing grew at an average annual rate of 2.8% (Table 1), outpacing the expansion recorded in most other segments.

Table 1

Retail selling area by type of activity, in thousands of m². 2004-2009

	2004	2005	2006	2007	2008	2009	Average growth (2004-2009)
Grocery retailing	17,726	18,080	18,933	21,225	21,703	20,385	2.8%
Non-grocery retailing	66,124	69,995	73,476	74,710	73,900	69,401	1.0%
Clothing and footwear	10,271	10,409	10,911	10,761	10,635	10,018	-0.5%
Home	23,181	25,110	26,332	27,057	26,711	25,161	1.7%
Rest	32,673	34,476	36,233	36,869	36,554	34,222	0.9%
Mixed commerce and others	13,925	15,009	15,648	16,142	16,698	16,013	2.8%
Total businesses	97,775	103,084	108,057	112,077	112,301	105,799	1.6%

Source: Prepared in-house using data from the Ministry of Industry, Tourism and Trade (MITYC). Boletín de Información Comercial Española July 2010 and August 2011.

⁶ Source: Mercasa (2010), *Alimentación en España 2010 (Food in Spain 2010)*.

⁷ The number of persons employed in *Retailing of food products, beverages and tobacco in specialised stores* is used as a proxy figure for this calculation. Source: MITYC (2011), *Boletín de Información Comercial Española*, August.

Food retailing has undergone a sweeping change in recent decades, which has been characterised by the previous model based on the traditional commercial format being replaced by another one dominated by supermarkets and hypermarkets that belong to major retail groups.⁸

This transformation has been driven by the profound economic, social and demographic changes recorded in this period, such as the stepped-up increase in women's employment rate, the reduction in the time families have available for shopping, and the rapid expansion of residential zones in city suburbs.

The consolidation of large retailers has been accompanied by a sharp increase in the level of business concentration, as well as by diverse movements toward vertical integration, creation of group purchasing organisations, retailer strategies to differentiate their company brands and to create value added services, and the development of retailer own brands (ROBs). All this has greatly changed the relations between all operators within the food supply chain.

The higher degree of concentration in retail distribution and the strong development of retailer brands have tilted the scales of bargaining power inside the agro-food supply chain to the side of retailers. In this context, retailers can wield that power to obtain better prices for the goods they buy from their suppliers. Although improved prices may eventually be passed onto consumers, the large retailers are now also able to carry on certain commercial practices not aimed at lowering prices but based on other aspects of the commercial relation that can generate negative effects in terms of efficiency and competition, both on manufacturers and on retailers, as will be analysed in subsequent sections of this Report.

This chapter describes the main structural factors that explain why retailers' bargaining power has increased in recent years. Section 2.1 analyses the structure of the retail sector, chiefly characterised by growing concentration. Section 2.2 examines how the structure of retail formats has evolved, with a clear trend toward large supermarkets to the detriment of hypermarkets. The success of private labels, which have achieved intense growth in Spain in recent years, is examined in section 2.3. This is followed in section 2.4 by a discussion of the implications of these trends for the relations of bargaining power between manufacturers and retailers and the consequences for competition.

8 Cruz, I. and Oubiña, J. (2006), "Estructura de competencia y dispersión de precios en el comercio minorista" (Structure of Competition and Price Dispersion in Retailing), *Revista de Economía de Información Comercial Española*, N° 828.

2.1.

Concentration in grocery retailing

Retail distribution of products of daily consumption, which includes groceries, spans two differentiated product markets: (i) the upstream supply markets, in which the customers of the producers of the goods are the wholesale and retail distributors of those products, and (ii) the downstream markets, in which the retailers sell their products to the end consumers.⁹

For purposes of analysing the relative bargaining power of suppliers and retailers, consideration must be given both to the degree of concentration of the purchases made by retailers from their suppliers and to the concentration in sales, because even retailers without a significant relative weight in purchases can wield great bargaining power vis-à-vis suppliers if they are a key element for reaching consumers in a specific region.

2.1.1. Grocery supply wholesale markets.

Wholesale supply markets include the sale by the producers of these goods to the wholesale and retail distributors of those products. Satisfaction of the end demand through other sales channels, such as the horeca channel, is not included in this analysis because the products distributed there are not substitutive from the standpoint of demand, nor, in many cases, of the supply side.

On the demand side, the different products or groups of products of the wholesale market are not substitutable for each other, so each one of them may be considered a different market. However, considering the homogeneity of demand, which does not vary substantially from one group of products to another, the antitrust precedents, particularly in relation to mergers between retailers, have ruled that in certain cases it is sufficient to examine the purchasing power of the parties in relation to products of daily consumption as a whole,¹⁰ including those of the food industry. This does not mean that on some occasions it may be more appropriate to examine concentration by product. To assess the buying power of retailers, other factors such as the degree of penetration of retailer brands, which can vary by product, are also important.

Retailers normally acquire the products they distribute at the national level, whether through a group purchasing organisation¹¹ or through the purchasing department of the group to which those companies belong. This geographical scope reflects the Spanish consumer's priority preference for buying

9 See CNC merger cases C-0001/07 DIA/PLUS, C-0063/08 DINOSOL/SUPERMERCADOS HERDISA, C-0171/09 EROSKI/SABECO (Active), and the TDC Reports C83/03 CAPRABO/ALCOSTO and C107/07 EROSKI/CAPRABO, amongst others.

10 See CNC merger cases C107/07 EROSKI/CAPRABO, C-0001/07 DIA/PLUS, C-0063/08 DINOSOL/SUPERMERCADOS HERDISA and C-0171/09 EROSKI/SABECO (Active), the TDC Report C83/03 CAPRABO/ALCOSTO and Decisions of the European Commission in cases M.991 PROMODES/CASINO, M. 946 INTERMACHÉ/SPAR and M.1087 PROMODES/SIMAGO, amongst others.

11 Group purchasing organizations are groups set up by merchants to acquire bargaining power with regard to other operators in the market, whether suppliers or competitors. They are therefore designed as entities that bring together a variable number of retailers to leverage their buying and selling potential in order to obtain better commercial terms from suppliers.

foods products of domestic origin. This choice is influenced by specific shopping habits and national tastes, as well as mass media advertising. Retailers satisfy consumer demand for foreign products by acquiring them through a national branch of a transnational group, thus avoiding direct imports.¹²

The survey conducted to suppliers and retailers confirms that most negotiations between them are done on a centralised basis, although a minority of suppliers say they only negotiate locally and around 20% combine centralised negotiations with more regional or local negotiations as well. Sales to group purchasing organisations are widely used, with 78% of the manufacturers surveyed stating that they use this channel. The major retailers normally have their own international purchasing department, with only a minority of the retailers surveyed indicating they belong to an international purchasing alliance.

The biggest groups in Spain, such as Mercadona, Carrefour and Auchan, have independent group purchasing organisations, whereas companies with smaller sales, such as Dinosol, Ahorramás and El Árbol, rely on purchasing chains made up of different affiliated companies with the aim of obtaining better prices for their supplies.

Given the national nature of the supply markets, both the sales figures and the square metres of sales area are considered adequate indicators of each retailer's position in the supply market.

According to data from the MITYC, in 2009 the total net sales of the leading food distribution groups amounted to 59,604 million euros (Table 2). In the last few years, the major multinational distribution groups have achieved a predominant role in grocery retailing. Based on net sales volume in 2009, Mercadona was the leading operator in Spain, followed by Carrefour, Grupo Eroski, Auchan and El Corte Inglés. The aggregate revenues of those top five accounted for 72.2% of the net sales of the leading food retailing groups in 2009.

¹² CNC, merger case C107/07 EROSKI/CAPRABO.

Table 2

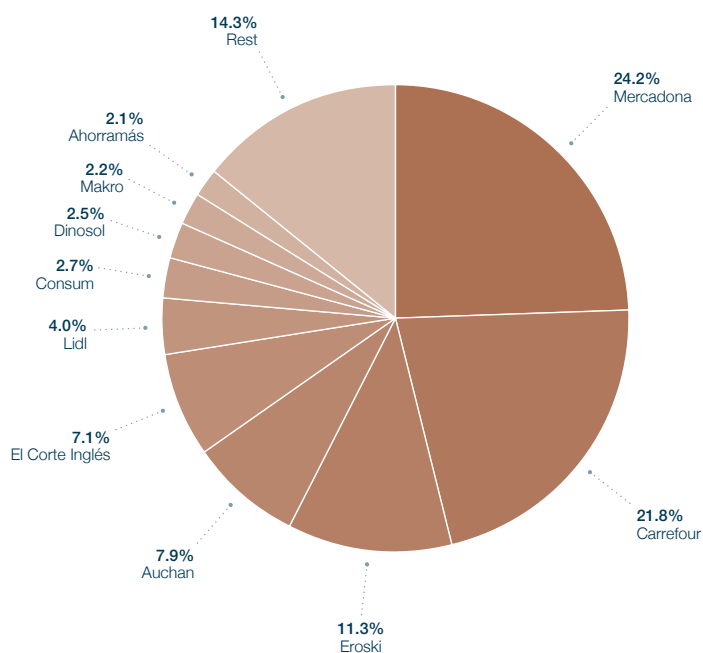
Net sales of leading grocery retailing groups, in millions of euros and in %. 2008- 2009

	Chain / Central	2008	2009	2008 (in %*)	2009 (in %*)
Mercadona, S.A.	Independent	14,284	14,402	23.3%	24.2%
Carrefour (group) a)	Independent	13,738	12,970	22.4%	21.8%
Eroski Group (food division)	Eroski Group	7,217	6,755	11.8%	11.3%
Auchan (group) b)	Independent	4,894	4,684	8.0%	7.9%
El Corte Inglés (food) c)	Independent	4,735	4,210	7.7%	7.1%
Lidl Supermercados, SA	Independent	2,238	2,400	3.6%	4.0%
Consum, S. Coop.	Independent	1,558	1,584	2.5%	2.7%
Dinosol Supermercados, S.L. (group)	IFA Esp.	1,690	1,494	2.8%	2.5%
Makro Autoservicio Mayorista, SA	Independent	1,385	1,332	2.3%	2.2%
Ahorramás, SA (group)	IFA Esp.	1,222	1,264	2.0%	2.1%
Miquel Alimentació Grup, SA	IFA Esp.	1,166	1,045	1.9%	1.8%
Gadisa group	IFA Esp.	868	889	1.4%	1.5%
Grupo El Árbol Distrib. y Sup., SA	IFA Esp.	703	814	1.1%	1.4%
Condis Supermercats, SA (group)	IFA Esp.	705	720	1.1%	1.2%
Alimerka, SA (group)	IFA Esp.	512	519	0.8%	0.9%
Bon Preu, SA (group)	IFA Esp.	475	509	0.8%	0.9%
Grupo Froiz	Euromadi	490	492	0.8%	0.8%
Covirán, SCA	Euromadi	440	471	0.7%	0.8%
H.D. Covalco, SA (group)	Euromadi	442	449	0.7%	0.8%
Uvesco, SA (group)	IFA Esp.	434	444	0.7%	0.7%
Aldi Supermercados, S.L. (group)	Independent	396	430	0.6%	0.7%
Grupo Hermanos Martín, SA (group)	IFA Esp.	387	385	0.6%	0.6%
Unide, S. Coop	Eroski Group	454	382	0.7%	0.6%
Hiper Usera, S.L.	IFA Esp.	391	352	0.6%	0.6%
Semark AC Group, SA	Euromadi	290	308	0.5%	0.5%
E. Leclerc (group)	IFA Esp.	285	300	0.5%	0.5%
Total leading groups		61,399	59,604	100.0%	100.0%

Notes: a) Carrefour (group): Centros Comerciales Carrefour, S.A. and DIA, S.A.; b) Auchan (group): Alcampo, S. A. and Supermercados Sabeco, S.A.; c) El Corte Inglés (food): Hipercor, S.A., El Corte Inglés (supermarkets), Supercor, S.A., Tiendas de Conveniencia, S.A. and Gespevesa. * The % are in relation to the total net sales of the companies listed in the table.

Source: Prepared in-house using data from the MITYC. Boletín de Información Comercial Española July 2010 and August 2011, and Alimarket.

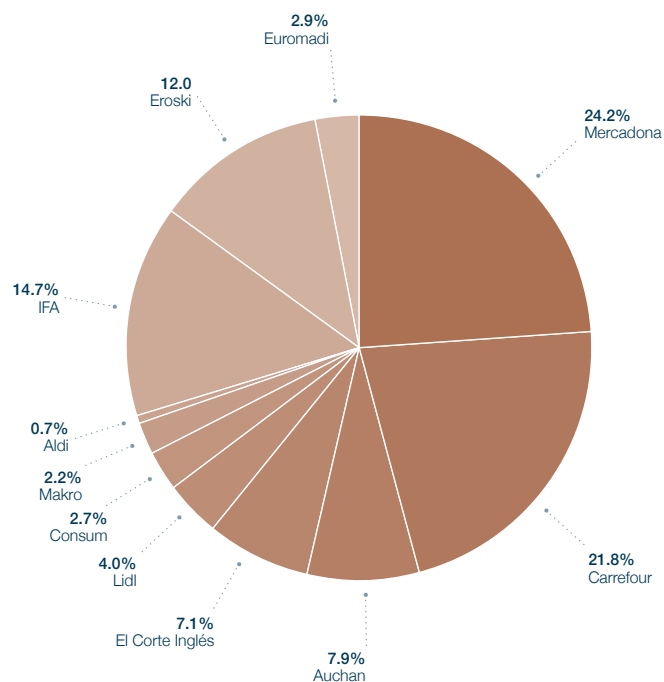
Figure 1
Market shares by sales per retailer. 2009



Source: Prepared in-house using data from the MITYC. Boletín de Información Comercial Española, August 2011.

By affiliated buyer, the independent group purchasing organisations account for 70.5% of overall net sales, whereas the two main affiliated groups, IFA and Euromadi, represented 14.7% and 2.9%, respectively. The remaining 12.0% was for the Eroski Group.

Figure 2
Market shares by sales in Spain according to membership in a group purchasing organisation. 2009

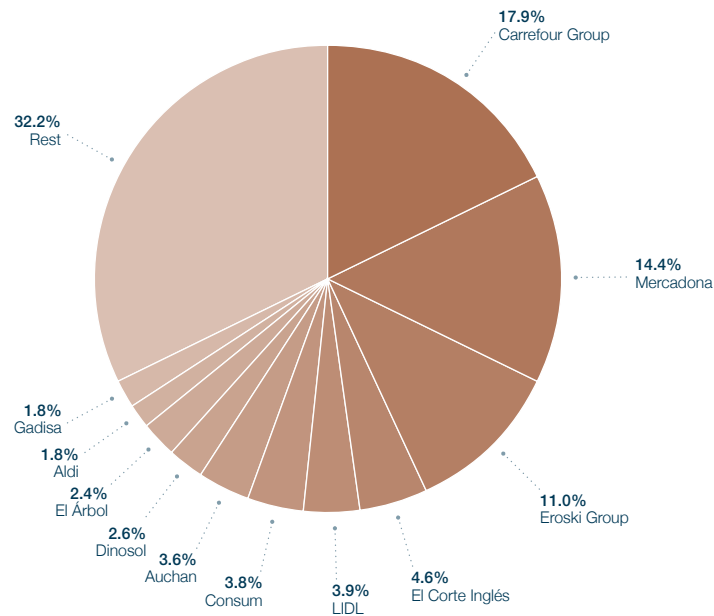


Source: Prepared in-house using data from the MITYC. Boletín de Información Comercial Española, August 2011.

In terms of share of the square metres of grocery retailing floor area (Figure 3), Carrefour tops the list with 17.9% of total floor area, followed by Mercadona (14.4%), Eroski Group (11.0%) and El Corte Inglés (4.6%), giving the four groups a combined share of 47.9%.

Figure 3

Share (%) of total grocery retailing floor area of the main operators. 2010



Notes: the shares are calculated in relation to the retailing area in the universe of organised distribution (hereinafter, total floor area) at 31/12/2010.

Source: Prepared in-house using data from Alimarket. Monograph, March 2011.

The level of concentration has been growing, as borne out by the 9.3 percentage point rise in the combined market share of the top four operators from 2002 to 2009 (Table 3). Mercadona is far and away the retailer that has increased its market share the most during this period, rising from 12.8% in 2002 to 21.0% in 2009.¹³

¹³ The source of these market shares is the Boletín de Información Comercial Española, August 2011, published by the MITYC. The calculations have been done for 2002-2009 considering the total food market, without including the household cleaning and perfumery sections of each group, using the Alimarket journal as source with data from the Kantar Worldpanel.

Table 3

Trend in market shares (%) of leading grocery distribution groups 2002-2009

	2002	2003	2004	2005	2006	2007	2008	2009
Carrefour Group a)	22.0%	22.1%	22.4%	21.7%	22.4%	23.2%	22.4%	21.7%
Mercadona, S. A.	12.8%	14.6%	16.3%	17.8%	18.7%	19.6%	20.6%	21.0%
Eroski Group b)	8.2%	8.3%	7.4%	7.3%	7.5%	10.1%	9.9%	9.7%
Auchan Group c)	5.7%	6.0%	6.1%	5.8%	5.8%	5.8%	5.6%	5.6%
Combined share of the four groups	48.7%	51.0%	52.2%	52.6%	54.4%	58.7%	58.5%	58.0%

Notes:

a) Carrefour Group: Centros Comerciales Carrefour, SA + Día, SA (includes Plus Supermercados from 2007).

b) Eroski Group: Eroski (super) + Eroski (hyper) + Caprabo, SA (as from 2007).

c) Auchan Group: Alcampo, SA + Supermercados Sabeco, SA.

Note: Shares calculated taking into account total grocery retailing market without household cleaning products and perfumes.

Source: MITYC. Boletín de Información Comercial Española, August 2011.

Various factors have contributed to increasing the level of retail concentration. First, changes in demographics, the economy and in how shoppers travel about have given rise to changes in buying habits toward a type of consumer who buys his or her goods at a single establishment and once a week.¹⁴ This has permitted the emergence of a retailing model based on the predominance of supermarkets and hypermarkets, which has in turn allowed operators to boost their efficiency by generating economies of scale.¹⁵ Second, the development of information technologies has helped to increase efficiency in distribution, by improving the management of stocks, reducing transaction costs in supplier-retailer relations and providing retailers with valuable information on consumer habits. Third, the capacity of the larger retailers to produce their own labels has greatly strengthened their expansion in the market.

The level of concentration varies sharply between formats. In supermarkets, the market share of the top four operators rose to 44.4% of total sales floor area in 2010 (Table 4), with Mercadona at the top of the ranking (17.0% of total square metres of sales area in supermarkets and self-service outlets), followed by the Carrefour Group (13.6%), Eroski (9.2%) and Lidl (4.6%). Conversely, the combined share of the top four operators in the hypermarkets

14 OECD (1998): *Buying Power of Multiproduct Retailers*, Policy Roundtables Document.

15 Cruz, I. and Oubiña, J. (2006), "Estructura de competencia y dispersión de precios en el comercio minorista" (Structure of Competition and Price Dispersion in Retailing), *Revista de Economía de Información Comercial Española*, N° 828.

segment was 90.7%, with Carrefour as the clear leader (with 42.4% of total sales area), followed by Eroski (20.7%), Auchan Group (16.7%) and Hipercor (10.9%). In the discount format, concentration has traditionally been higher than that observed in hypermarkets.

Table 4

Share of total sales area of top operators, by format. 2010

Top retailers in supermarkets and self-service outlets	2010	Top retailers in hypermarkets	2010
Mercadona	17.0%	Carrefour Group	42.4%
Carrefour Group	13.6%	Eroski	20.7%
Eroski	9.2%	Auchan Group	16.7%
Lidl	4.6%	Hipercor	10.9%
Consum	4.5%	Dinosol	2.2%
El Corte Inglés	3.5%	E. Leclerc	1.7%
Combined share of top four	44.4%	Combined share of top four	90.7%

Notes: the % indicate each retailer's share of the total square metres of supermarkets and self-service outlets at 31-12-2010; the supermarkets and self-service outlets segment includes discount stores.

Source: Prepared in-house using data from Alimarket. Monograph, March 2011.

2.1.2. Retail distribution market

What is known as self-service retailing, which includes diverse formats in which buyers can shop unattended by store personnel, has normally been considered a separate product market from that in which goods are sold in the traditional format (small stores and personalised attention) and the market where sales are made in specialised stores, given the asymmetric competition that exists between them.¹⁶ In short, shopping done in outlets with a more limited offering is not considered equivalent to that carried on at retailers where buyers can purchase most of the products needed at a single point of sale, that is, "one-stop shopping".

In this sense, the self-service retail distribution market consists of all sales outlets that allow supply of all types of products of daily consumption, food and non-food, without the intermediation of a person employed to serve the

¹⁶ See CNC merger cases C-0001/07 DIA/PLUS, C-0063/08 DINOSOL/SUPERMERCADOS HERDISA, C-0171/09 EROSKI/SABECO (Active), and the TDC Reports C83/03 CAPRABO/ALCOSTO and C107/07 EROSKI/CAPRABO, amongst others.

buyers. This market would specifically include neighbourhood stores (self-service outlets smaller than 400 m²), medium outlets (supermarkets with a sales floor of between 400 m² and 2,500 m²), large outlets (hypermarkets with sales area of more than 2,500 m²) and discount stores (shops with a limited range of fast-moving consumer goods normally with the retailer's brand at low prices).

The geographical scope of this market is local.¹⁷ From the consumer's standpoint, the choice of a specific point of sale is conditioned by how far buyers may reasonably travel to do their shopping. In general, for practical reasons, end consumers will choose an outlet close to their home for minor purchases and may be more disposed to going farther away to make larger purchases.

The specific geographical size of each significant local market may vary as a function of its concrete circumstances. In theory, the appropriate territorial scope for the analysis will be larger in the case of locations close to a large shopping complex and in those that may be commercially dependent on neighbouring towns. This is also the case in residential zones, where the population is accustomed to using their own vehicles for carrying on most of their daily activities. The criterion generally used to delineate the relevant geographical market is based on the isochrone, the imaginary line jointing population centres that are equidistant from a shopping centre, usually measured in driving times of 15-30 minutes.¹⁸

Applying this criterion is not workable for purposes of the analysis conducted in this Report. But, in any event, the available data show that the levels of concentration in each and every one of the Autonomous Communities is higher than the concentration at the national level. This is due, in part, to the different expansion strategies pursued by the main retail groups. The combined market share of the top three operators is over 50% in most cases (Table 5), with the greatest concentration being found in the Basque Country, Balearic Isles and Navarre regions.

Carrefour is currently the biggest operator in five regions, including Madrid and Catalonia, and also has the largest share of national retailing floor area, with 18% of the total square metres. Eroski has more than a 30% share of total floor area in the Basque Country, Balearic Isles and Navarre. In Asturias, a regional chain, Alimerka, accounts for 31% of the total square metres.

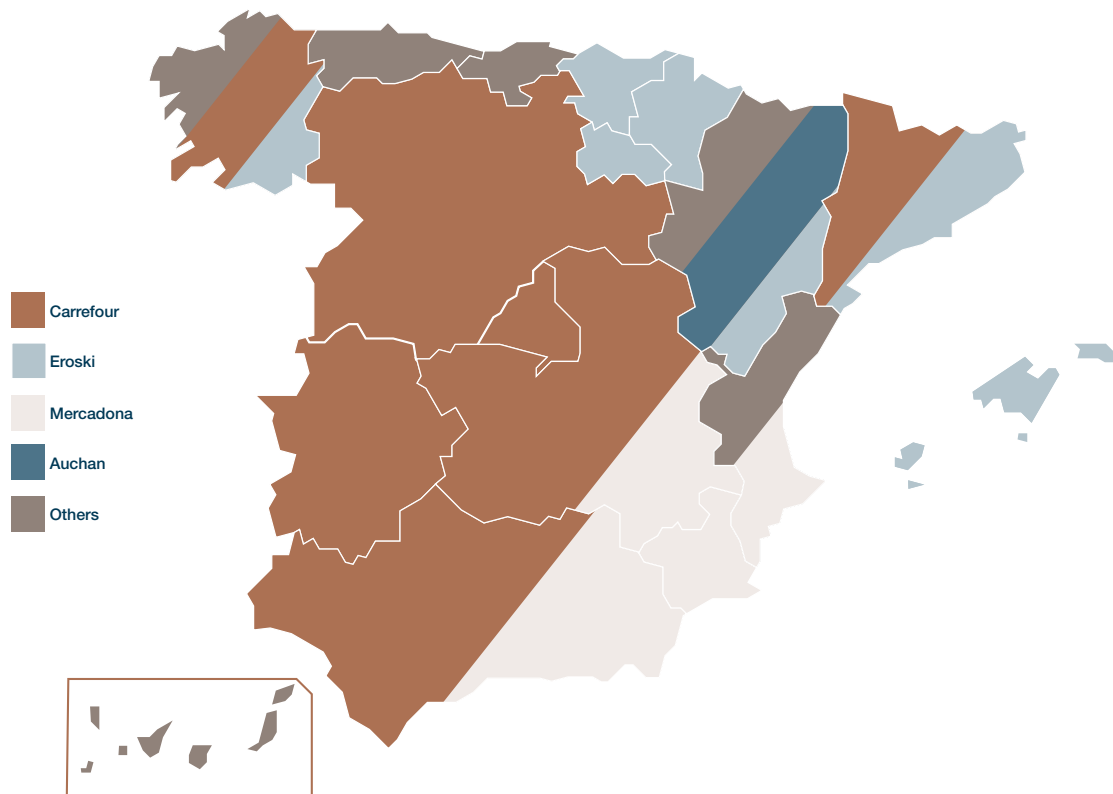
¹⁷ See CNC, merger cases C-0001/07 DIA/PLUS, C-0063/08 DINOSOL/SUPERMERCADOS HERDISA, C-0171/09 EROSKI/SABECO (Active), C-0224/10 SUPECO/SUPERMERCADOS DE ALIMENTACIÓN MADRID, C-0260/10 CONSUM/VIDAL EUROPA, C-0283/10 CONSUM/VIDAL EUROPA, C-0362/11 UVESCO/ERCORECA, C-0367/11 LECLERC/EROSKI and TDC Reports C83/03 CAPRABO/ALCOSTO and C107/07 EROSKI/CAPRABO, amongst others.

¹⁸ In the series of Reports on Department Stores that the CNC issued beginning with the entry into force of Act 7/1996 regulating the retail sector (the LCM), when analysing the conditions of competition in the market in which a new outlet was to operate, the relevant geographical market was delineated using an isochrone of 15 minutes if the outlet was in an urban centre, or of 30 minutes if it was in a rural area or there was no other department store in the area considered. Similarly, the European Commission, in case M.1684 Carrefour/Promodes, stated that, as a general rule, the areas of influence are geographically delimited by a radius of not more than 30 minutes of travel by car, knowing that this radius will vary as a function of diverse criteria, such as the size of the point of sale (which depends on the variety of the offering and on the articles), the commercial infrastructure associated with the outlet, road and transportation links and the quality of the surroundings.

There are different patterns of regional specialisation amongst the top national operators (Map 1). Eroski, for example, is number one in the Basque Country, Navarre and La Rioja. For its part, Carrefour is ranked first in Andalusia, Extremadura, Castilla y León and the region of Madrid, while Mercadona holds the top spot in Valencia, Murcia and Castilla-La Mancha. Auchan holds the top spot in Catalonia.

Map 1

Main grocery retailing operator, by Autonomous Community. 2010



Note: The map indicates the top operator in each region as measured by share of total floor area; in those regions where the difference between the top two or three operators is small, more than one operator is included.

Source: Prepared in-house using data from the MITYC. Boletín de Información Comercial Española, August 2011.

The degree of concentration increased in most Autonomous Communities between 2005 and 2010. Comparing Table 5 and Table 6, we see a particularly sharp rise in Extremadura (16 percentage points) and Andalusia and the Balearic Isles (7 percentage points), and smaller but likewise significant increases in Navarre, the Basque Country and Castilla-La Mancha (4 percentage points). The regions of Madrid and Valencia saw concentration intensify by 3 percentage points. Conversely, five regions —Murcia, Asturias, Aragón, Galicia and La Rioja— saw the level of concentration decline somewhat.

Table 5

Concentration of leading grocery retailing groups by Region. 2010

Autonomous Community (Region)	Top operator		Second operator		Third operator		Combined share of top three
	Operator	Share (%)	Operator	Share (%)	Operator	Share (%)	
Basque Country	Eroski	40.9%	Carrefour	15.6%	Uvesco	15.3%	71.8%
Balearic Isles	Eroski	37.8%	Spar	15.6%	Mercadona	13.8%	67.2%
Navarre	Eroski	37.4%	Carrefour	18.3%	Uvesco	11.4%	67.1%
La Rioja	Eroski	26.8%	Auchan	21.9%	Carrefour	17.7%	66.4%
Cantabria	Semark AC Group	34.9%	Carrefour	20.0%	Eroski	9.9%	64.8%
Valencia	Mercadona	25.0%	Consum	22.6%	Carrefour	14.2%	61.8%
Principality of Asturias	Alimerka	31.0%	El Árbol	15.2%	Carrefour	13.8%	60.0%
Galicia	Gadisa	21.3%	Eroski	20.7%	Carrefour	17.9%	59.9%
Canary Islands	Dinosol	24.8%	Agrucan	18.1%	Mercadona	15.7%	58.6%
Extremadura	Carrefour	25.6%	Líder Aliment.	19.1%	Mercadona	12.2%	56.9%
Murcia	Mercadona	24.3%	Carrefour	17.3%	Eroski	9.3%	50.9%
Aragón	El Árbol	19.3%	Auchan	16.6%	Eroski	14.5%	50.4%
Andalusia	Carrefour	19.9%	Mercadona	19.1%	Coop. Coviran	11.1%	50.1%
Castilla-La Mancha	Mercadona	19.8%	Carrefour	19.4%	Eco Mora	9.9%	49.1%
Madrid	Carrefour	25.5%	Mercadona	12.2%	El Corte Inglés	10.5%	48.2%
Castilla y León	Carrefour	21.7%	El Árbol	12.1%	Mercadona	11.5%	45.3%
Catalonia	Carrefour	18.4%	Eroski	14.7%	Mercadona	11.0%	44.1%
National Level	Carrefour	17.9%	Mercadona	14.4%	Eroski	11.0%	43.3%

Note: Shares are calculated as a percentage of the total floor area a 31/12/2010.

Source: MITYC. Boletín de Información Comercial Española, August 2011.

Table 6

Concentration of leading grocery retailing groups by Region. 2005

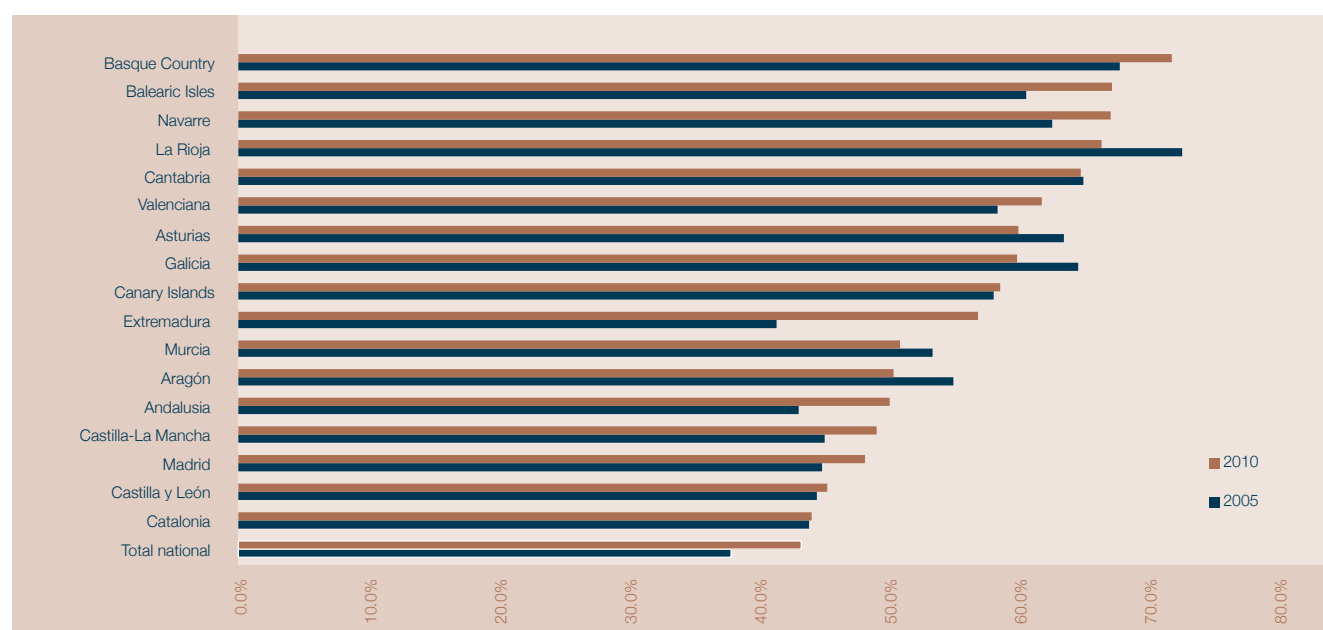
Autonomous Community (Region)	Top operator		Second operator		Third operator		Combined share of top three
	Operator	Share (%)	Operator	Share (%)	Operator	Share (%)	
La Rioja	Eroski	29.1%	Auchan	25.0%	Carrefour	18.5%	72.6%
Basque Country	Eroski	39.1%	Carrefour	16.4%	Uvesco	12.3%	67.8%
Cantabria	Semark AC Group	31.2%	Carrefour	20.1%	Coop. Coviran	13.7%	65.0%
Galicia	Gadisa	23.1%	Eroski	22.8%	Carrefour	18.7%	64.6%
Principality of Asturias	Alimerka	27.9%	El Árbol	18.2%	Carrefour	17.4%	63.5%
Navarre	Eroski	26.1%	Carrefour	19.7%	Caprabo	16.8%	62.6%
Balearic Isles	Eroski	33.3%	Caprabo	14.1%	Mercadona	13.2%	60.6%
Valencia	Mercadona	26.6%	Consum	16.5%	Carrefour	15.3%	58.4%
Canary Islands	Dinosol	25.8%	Agrucan	19.5%	Mercadona	12.8%	58.1%
Aragón	Galerías Primero	19.9%	Auchan	19.3%	Carrefour	15.8%	55.0%
Murcia	Mercadona	26.8%	Carrefour	19.0%	Eroski	7.6%	53.4%
Castilla-La Mancha	Mercadona	19.1%	Carrefour	16.6%	Eroski	9.4%	45.1%
Madrid	Carrefour	24.1%	Caprabo	11.3%	Ahorramás	9.5%	44.9%
Castilla y León	Carrefour	22.3%	El Árbol	13.3%	Eroski	8.9%	44.5%
Catalonia	Carrefour	18.7%	Caprabo	16.1%	Mercadona	9.1%	43.9%
Andalusia	Carrefour	17.6%	Mercadona	15.6%	Coop. Coviran	9.9%	43.1%
Extremadura	Carrefour	23.1%	El Arbol	9.7%	Mercadona	8.6%	41.4%
National Level	Carrefour	17.7%	Mercadona	11.9%	Eroski	8.3%	37.9%

Note: Shares are calculated as a percentage of the total floor area a 31/12/2005.

Source: MITYC. Boletín de Información Comercial Española, May 2006.

Figure 4

Share of total grocery retailing floor area, as %, of the main operators. 2005 and 2010



Note: Shares are calculated as a percentage of the total floor area at 31/12/2005 and 31/12/2010.

Source: MITYC. Boletín de Información Comercial Española, May 2006 and August 2011.

As for the change in the market shares of the top retailers, Mercadona and Eroski increased by two and by one, respectively, in the number of regions in which they were ranked amongst the top three operators in 2005, whereas Carrefour decreased by one. Also, taking as reference the regions in which the operator was ranked in the top three both in 2005 and in 2009, we can see that Carrefour's share narrowed in ten regions and rose in four, while Mercadona's expanded in six and declined in two, and Eroski's increased in four and decreased in two.

2.2.

Retailing formats

In the food retail sector there are different retailing formats:¹⁹

- **Hypermarkets.** These establishments normally have a floor area of more than 2,500 m². Within this category there are further differentiations by size: some run as large as 7,000 or 10,000 m² or more, while others are closer to the 2,500 m² threshold.

¹⁹ See CNC, merger cases C-0001/07 DIA/PLUS, C-0063/08 DINOSOL/SUPERMERCADOS HERDISA, C-0171/09 EROSKI/SABECO (Active), C-0224/10 SUPECO/SUPERMERCADOS DE ALIMENTACIÓN MADRID, C-0260/10 CONSUM/VIDAL EUROPA, C-0283/10 CONSUM/VIDAL EUROPA, C-0362/11 UVESCO/ERCORECA, C-0367/11 LECLERC/EROSKI and TDC Reports C83/03 CAPRABO/ALCOSTO and C107/07 EROSKI/CAPRABO, amongst others. Also see the report from the Galician competition tribunal, the Tribunal Gallego de Defensa de la Competencia (2007), *La distribución minorista de base alimentaria en Galicia desde la perspectiva de la competencia* (Grocery Retailing in Galicia from the Standpoint of Competition).

- **Supermarkets.** This format comprises three main subcategories: large supermarkets with a floor area of 1,000 m² – 2,500 m²; medium supermarkets with a floor area between 400 m² and 1,000 m²; and small supermarkets with less than 400 m² of floor area.
- **Discount outlets.** These establishments are characterised by a concentration of products and a smaller presence of manufacturer brands. The floor area ranges between 400 m² and less than 1,000 m².
- **Traditional stores.**
- **Other formats:** This group includes *Cash&Carry* establishments, which are self-service wholesalers, and “convenience” stores, which are retail outlets with a floor area of less than 500 m² and a diversified product offering, and which open more than 18 hours a day.

At present, supermarkets are the dominant format in grocery retailing, accounting for 47% of food purchases by households in 2009 (Table 7). Second in the ranking are traditional stores, which, though they have shed significant market share in recent years, still provide 27.7% of food purchases by households, more than hypermarkets (16.1%) and the remaining formats (9.2%).²⁰

This structure reflects the sector's development in recent years, characterised by the increasingly important role of supermarkets and lessening share of traditional retailers. From 1995 to 2009, traditional stores saw their share shrink eight percentage points, while supermarkets were boosting theirs by 11.5 percentage points. Hypermarkets have seen their share decline slightly (although it remains around 16%), as have the rest of the formats.

The fresh and dry grocery segments have developed differently. Supermarkets are the only format that has grown its share in both areas, while the loss of share by traditional shops was much greater in packaged foods than in fresh produce, as this format has only lost 3.2 percentage points in the latter segment since 1995 and is still the leader there. Hypermarkets have boosted their share in dry/packaged foods.

By types of food (fresh²¹ and dry), there are clear differences. Traditional stores are the leading format for fresh groceries, concentrating 45.5% of household purchases in this segment, whereas supermarkets have only a 33.4% share, a share which is 13.6 percentage points lower than the one observed at the aggregate level. Conversely, in the dry goods segment, the share held by traditional stores and other retail formats is clearly lower, to the benefit of supermarkets and hypermarkets.

²⁰ Which include self-supply, outdoor markets and other channels.

²¹ Fresh groceries include fresh fruits and vegetables, fresh meat, fish and fresh shellfish, fresh bread and eggs.

Table 7

Market shares of household grocery purchases, by retail format and as % of total sales value. 2009

	1995	1999	2003	2007	2008	2009
Total grocery						
Traditional store ^{a)}	35.6%	31.5%	30.1%	28.0%	28.2%	27.7%
Supermarkets ^{b)}	35.5%	39.9%	42.4%	45.6%	46.1%	47.0%
Hypermarkets	16.8%	17.0%	17.6%	16.9%	16.8%	16.1%
Rest ^{c)}	12.1%	11.6%	9.9%	9.5%	8.9%	9.2%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
Fresh produce						
Traditional store	48.7%	47.8%	46.7%	44.9%	45.5%	45.5%
Supermarkets	26.4%	27.4%	30.2%	33.0%	33.1%	33.4%
Hypermarkets	8.9%	9.0%	11.0%	10.3%	10.4%	9.6%
Rest	16.0%	15.8%	12.1%	11.8%	11.0%	11.5%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
Dry groceries						
Traditional store	24.1%	14.7%	13.9%	11.6%	12.1%	11.9%
Supermarkets	44.0%	52.8%	54.3%	57.1%	58.2%	59.1%
Hypermarkets	24.3%	25.3%	24.1%	22.9%	22.7%	22.0%
Rest	7.6%	7.2%	7.7%	8.4%	7.0%	7.0%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Notes:

a) The traditional store category include grocery stores, bakeries, butcher's shops, fish stores, frozen goods shops, and stands in markets and plazas.

b) Supermarkets also includes discount and self-service outlets.

c) Rest includes self-supply, outdoor markets and other channels.

Source: MITYC. Boletín de Información Comercial Española, July 2010.

Table 8 shows how the supermarket format has consolidated itself mainly as a result of the growth in large supermarkets, whose share of sales in the packaged foods segment has increased from 10% in 1994 to 38.0% in 2010. Conversely, the share of hypermarkets has dropped considerably.²²

Table 8

Evolution of packaged food sales by format, as % over total sales. 1994-2010

	1994	1996	1998	2000	2002	2004	2006	2008	2010
Traditional	13.0%	10.8%	9.0%	7.4%	5.9%	5.1%	4.4%	4.2%	5.1%
Self-service up to 100 m ²	12.0%	9.6%	8.8%	7.7%	6.4%	5.6%	4.8%	4.2%	3.9%
Small supermarket 100-399 m ²	19.0%	20.3%	20.9%	20.8%	19.8%	17.6%	16.4%	15.2%	15.0%
Medium supermarket 400-999 m ²	15.0%	14.9%	16.7%	19.6%	21.9%	21.5%	20.8%	20.2%	19.9%
Large supermarket 1000-2499 m ²	10.0%	11.6%	12.9%	15.5%	20.3%	26.2%	31.2%	35.4%	38.0%
Hypermarket 2500 m ² or more	31.0%	32.7%	31.6%	29.0%	25.7%	23.9%	22.5%	20.9%	18.2%

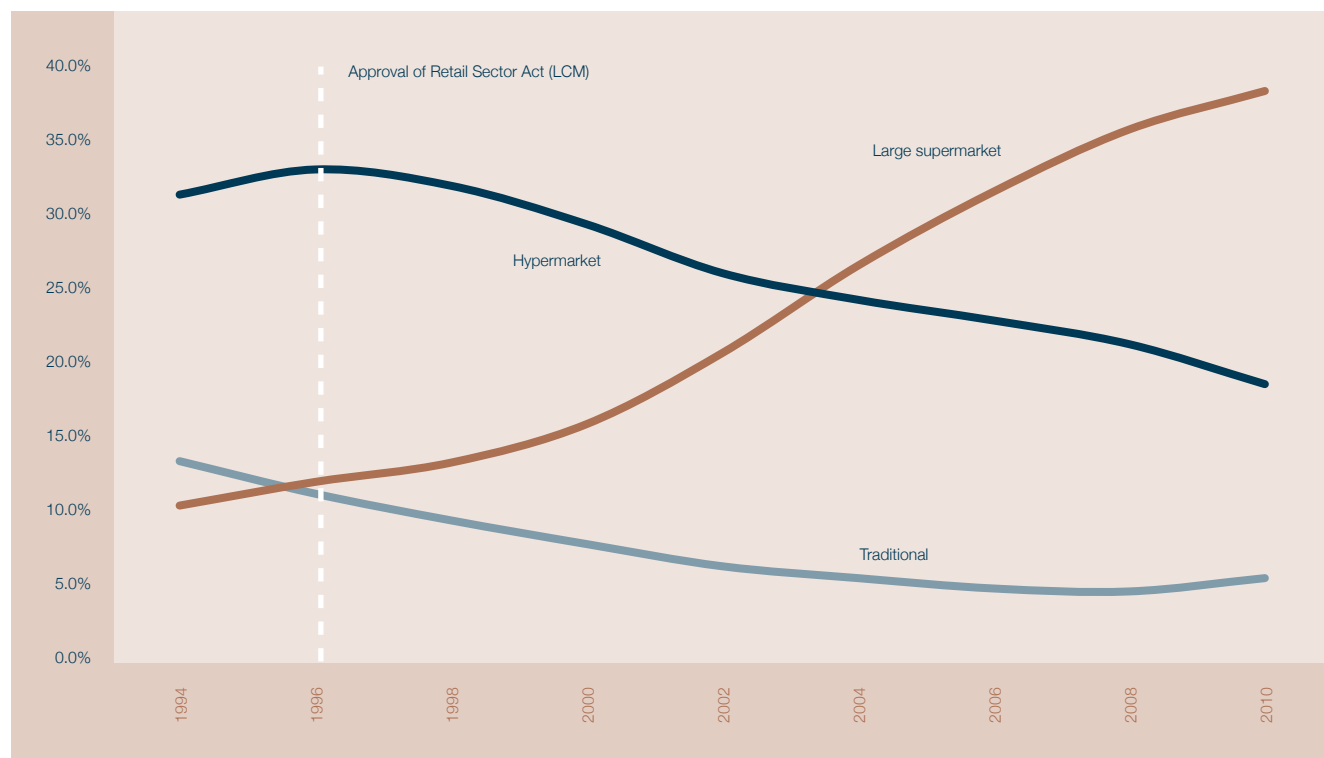
Source: MITYC. Boletín de Información Comercial Española, July 2010 and August 2011.

Two factors in particular explain the growing relative importance of supermarkets versus other retail formats and, more specifically, versus hypermarkets. One is that chain food stores, by using this format, have succeeded in offering a mix of proximity, variety and relatively long opening hours that is especially well suited to consumer preferences. And the other is the increasing restrictiveness of the laws that govern large department stores beginning in the mid-1990s. For these purposes, the main consequence of this trend has been to curb the growth of hypermarkets and favour the opening of supermarkets of less than 2,500 m². As shown by Table 8 and Figure 5, the 1996 approval of the LCM marks the start of the divergent growth trend in these two formats.

²² Although a comparison with other countries of the distribution of sales area by format is not very conclusive, because that distribution is conditioned by national factors, there is a remarkable divergence with respect to Spain as regards the changing relative weight of the different formats. For example, in France, sales of groceries in supermarkets and hypermarkets remained fairly stable over the last decade. According to data from the INSEE (INSEE (2010), *La situation du commerce en 2009*), from 1999 to 2009 the share of French supermarkets and hypermarkets in grocery sales was unchanged in aggregate, and neither format saw its share vary by more than 3%: supermarkets rose from 30.8% to 33.2%, while hypermarkets were diminishing from 35.4% to 32.3%. In practically the same period, for packaged goods in Spain, hypermarkets recorded a decline in their share of approximately 10 percentage points and supermarkets saw theirs grow nearly 26 percentage points (see Table 8).

Figure 5

Evolution of packaged food sales, as % of total sales and according to format (large supermarket, hypermarket, traditional format). 1994-2010



Source: Prepared in-house using data from the MITYC. Boletín de Información Comercial Española, August 2011.

In 2010 discount stores accounted for 9.5% of total square metres of sales area,²³ less than half of which (43%) was in the small supermarket format, 26% in self-service outlets and 31% in large supermarkets.

In the period 2003-2010, that share declined 4.3 percentage points, with a slightly sharper drop in the small supermarkets segment than in self-service establishments. Conversely, large supermarkets increased their share.

The low price and retailer brand strategies rolled out by hypermarkets and supermarkets in the 2000s have spawned a thorough overhaul of the business strategy pursued by discount stores, which are moving toward a greater product offering, with a larger presence of manufacturer brands and a more attractive shopping environment for their customers.²⁴

The different commercial strategies implemented by the leading grocery retailing groups have given rise to different format specialisation profiles. The operator which is most specialised in the hypermarket format is, by a large difference, Auchan (71.2% of its total sales area in 2009), although El Corte Inglés and Carrefour also exert a strong presence in this format (nearly 36%

²³ The data on discount stores analysed in this part of the Report have been sourced from Alimarket (several years), *Monográficos de Distribución Comercial* (Monographs on Retail Distribution), March, period 2004-2011. The data are calculated over floor area, not over total sales.

²⁴ MITYC (2007), *Boletín de Información Comercial Española*, June.

of their total sales area). Mercadona, with 91.8% of its total sales area, Aldi (62.9%) and Consum (58.5%) have focused their strategy on the large supermarket format. This format is also important in the strategy pursued by El Corte Inglés (over 48% of its total sales area), mainly under the Supercor banner. The smaller supermarket format is especially important in the strategy of El Árbol (64.1%), Condis (60.5%), Lidl (54.6%) and Ahorramás (53.6%). For its part, the self-service format is key to the strategy of Covirán (75.4%) and, to a lesser extent, of Condis (29.3%).

Table 9

Specialisation of major grocery retailers by format, as % of each company's total sales area. 2010

	Hypermarket	Large supermarket	Supermarket	Self-service	Total
Carrefour Group	35.7%	10.2%	34.6%	19.5%	100.0%
Mercadona	-	91.8%	8.2%	0.0%	100.0%
Grupo Eroski	28.5%	30.4%	31.6%	9.5%	100.0%
El Corte Inglés	35.9%	48.2%	15.9%	0.0%	100.0%
Lidl	-	45.4%	54.6%	-	100.0%
Consum	-	58.5%	31.0%	10.5%	100.0%
Auchan	71.2%	14.9%	10.5%	3.4%	100.0%
Covirán	-	1.5%	23.1%	75.4%	100.0%
Dinosol	12.5%	38.3%	38.8%	10.3%	100.0%
El Árbol	2.9%	24.0%	64.1%	9.0%	100.0%
Aldi	-	62.9%	36.9%	0.2%	100.0%
Gadisa	7.4%	33.7%	42.0%	16.9%	100.0%
Condis	-	10.2%	60.5%	29.3%	100.0%
Alimerka	-	51.1%	45.1%	3.8%	100.0%
Ahorramás	-	39.1%	53.0%	7.9%	100.0%

Note: The % indicate the share of each format in the total sales area of each company at 31-12-2010; Carrefour includes the Dia supermarkets and Eroski includes the Caprabo supermarkets.

Source: Prepared in-house using data from Alimarket. Monograph, March 2011.

In summary, during the last 15 years the trend in grocery retailing has been characterised by the growing dominance of supermarkets and decreasing importance of traditional retail outlets. The rise of supermarkets, grounded in the fast growth of the largest supermarkets, has been favoured by the restrictive nature of retailing regulations, which hinder the establishment of hypermarkets.

The analysis also underscores the existence of different format-specialisation profiles between the leading operators, as well as the adaptation of those strategies to consumer preferences and the competitive pressure existing between formats, as shown, in particular, by the strategic change of course observed in discount outlets.

2.3.

Retailer own brands

2.3.1. General features

Retailer own brands (ROBs) take in all goods sold under a brand that may be the name of the retailer or another name created exclusively by the retailer.

ROBs have two essential characteristics: the retailer owns the brand —something traditionally only done by the producer— and is also the one who sells it, unlike the case of manufacturer brands (MBs), which are distributed by different retailers²⁵ and can be marketed in other sales channels, such as *horeca*.²⁶

ROBs appeared for the first time at the end of the 19th century in the United Kingdom, when Sainsbury developed its own brand. It was not until the second half of the 20th century, however, that this phenomenon acquired importance, when Carrefour took the first major initiative in 1976 by introducing 50 free or non-branded products which it named with its logotype.²⁷

In Spain this process began in the 1970s, with Eroski being the first retailer to market private label brands in 1977. Since then, and especially in the last two decades, the growth of ROB market share in food products has been very intense, taking their share from 6.8% in 1990 to 33.7% by 2009 (Figure 6), with that growth accelerating since 2007, as has become customary during economic downturns.

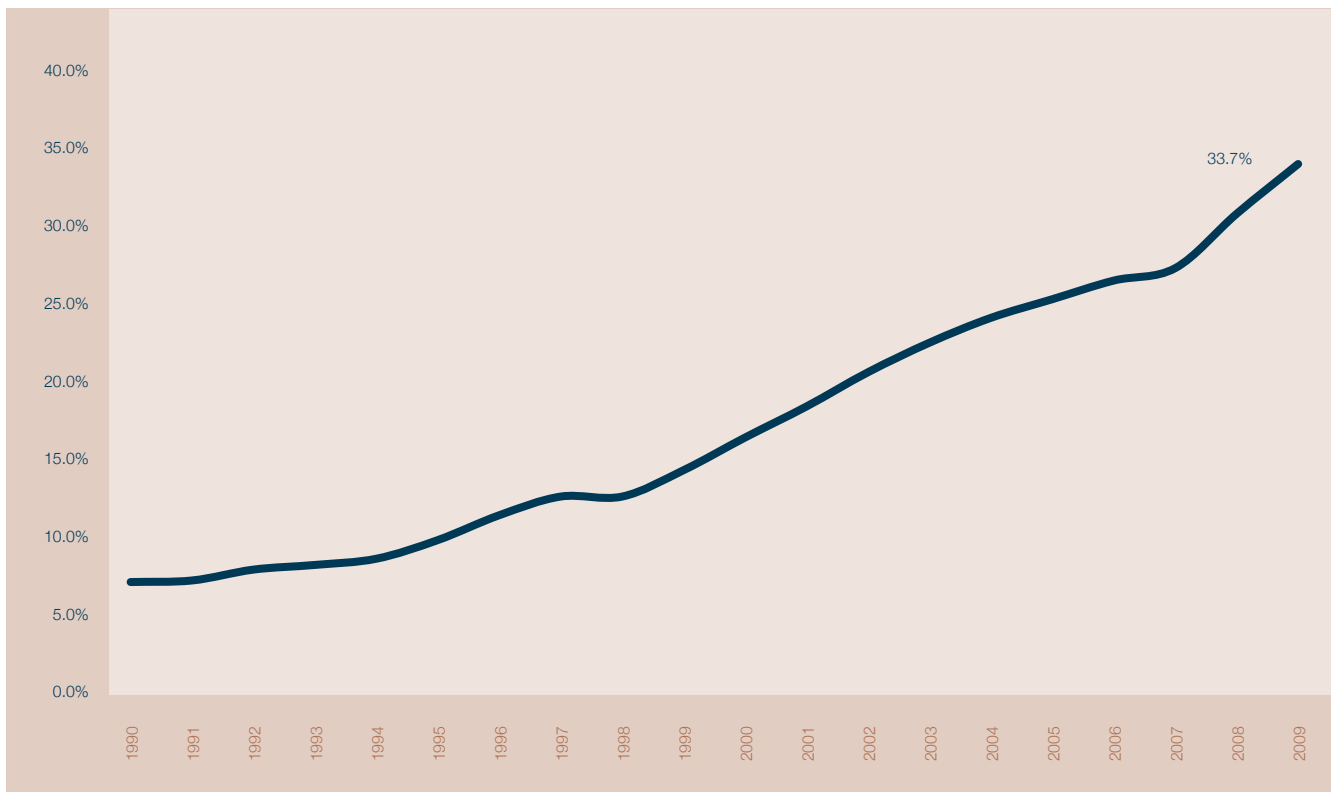
²⁵ Traditionally, ROBs were only sold by the retailer who owned them. Nevertheless, beginning a few years ago some retailers are now selling their brands through other distributors as well (see Puellas, M. and Puellas, J. (2009), “Evolución, situación actual y perspectivas de MDD en España” (Evolution, current situation and prospects for ROBs in Spain), *Distribución y Consumo*, September – October 2009).

²⁶ Although this only happens in certain products that maintain the brand for the end consumer in the *horeca* channel, such as alcoholic beverages.

²⁷ Gázquez, J. C. and Sánchez, M. (2007) “Análisis de la estructura competitiva entre marcas nacionales y marcas privadas: un análisis empírico con datos de escáner” (Analysis of competitive structure between national brands and private label brands: an empirical analysis with scanner data), *Revista de Economía de Información Comercial Española*, N° 839.

Figure 6

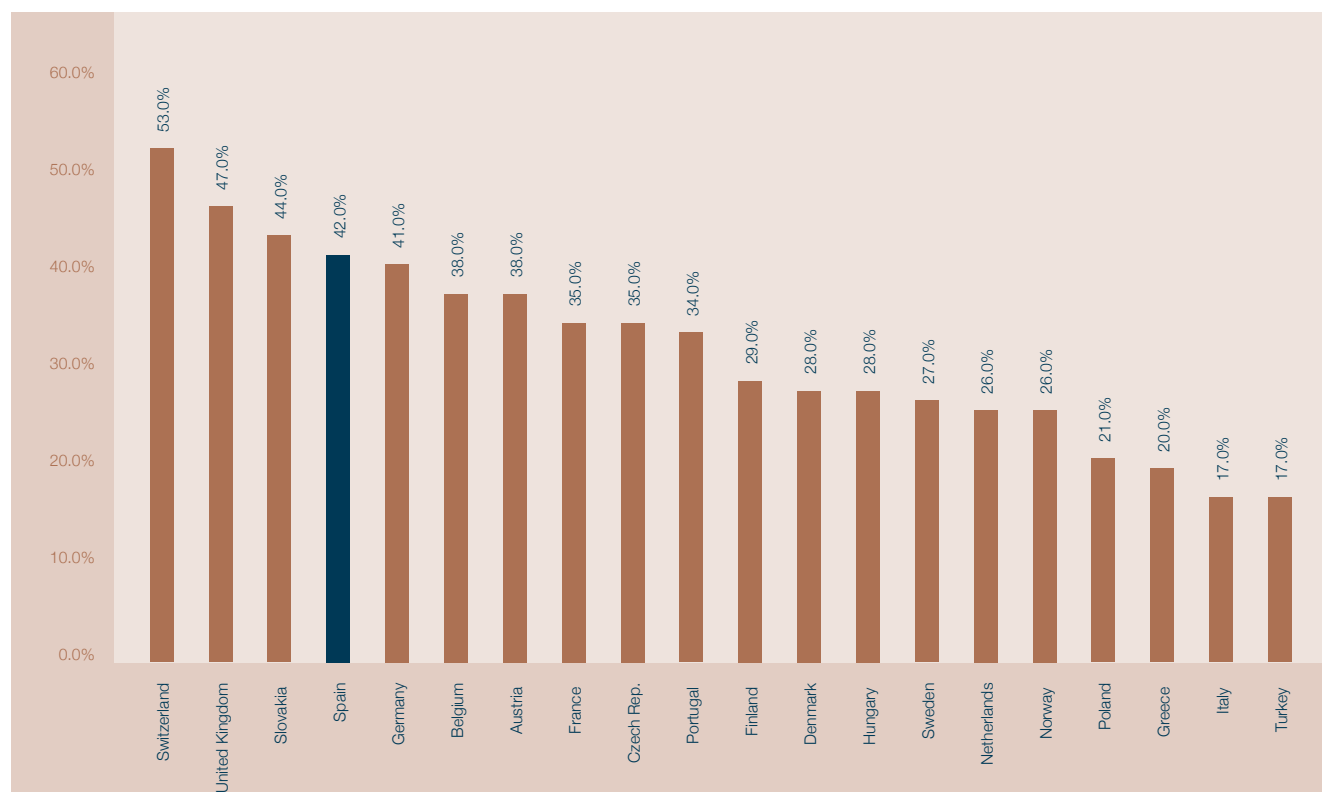
ROB market share in Spanish grocery retailing, as % of total sales. 1990-2009



Source: AC Nielsen Annual Reports (years: 1992-2010).

For an international comparison of the level of ROB penetration, the only data available are volume figures for fast moving consumer goods (FMCG). In addition to groceries, this category also includes cleaning products and perfumes, thereby explaining why the share for Spain differs from the one given in Figure 6. In the FMCG category, Spain ranks amongst the European countries where ROB's have achieved the biggest market share (Figure 7). In 2010 Switzerland was the country with the largest ROB share (53%), followed by the United Kingdom (47%), Slovakia (44%) and Spain (42%). Spain ranks higher than countries like France, Austria and Denmark, nations which in the mid-1990s had a larger ROB market share than Spain.²⁸

²⁸ Fernández, P., Albert, R., and Puellas, J. A. (1997), "Marcas de distribuidor: Especial referencia al precio" (Retailer brands: Special price reference), *Distribución y Consumo*, N° 33.

Figure 7ROB market shares for fast moving consumer goods in Europe, as % of volume. 2010²⁹

Note: Fast moving consumer goods include food, cleaning products and perfumery.

Source: MITYC. Boletín de Información Comercial Española, August 2011.

ROBs are spawned by competition between retailers, who rely on this tool to satisfy consumer demand through more cost-efficient alternatives than manufacturer brands, while also ensuring a certain variety of goods and adequate quality levels.³⁰

In Spain, as in other countries, ROBs have developed in parallel to the increase in retailing concentration (Figure 8), largely as a result of the existence of economies of scale in the production and development of retailer brands. The unit cost of producing, designing and promoting the brand decline as the retailer's total sales rise.³¹

Nevertheless, there are also other factors that have contributed to the growing strength of ROBs, most notably: the social and cultural traits of consumers, their shopping patterns and the degree of development of discount stores, which are

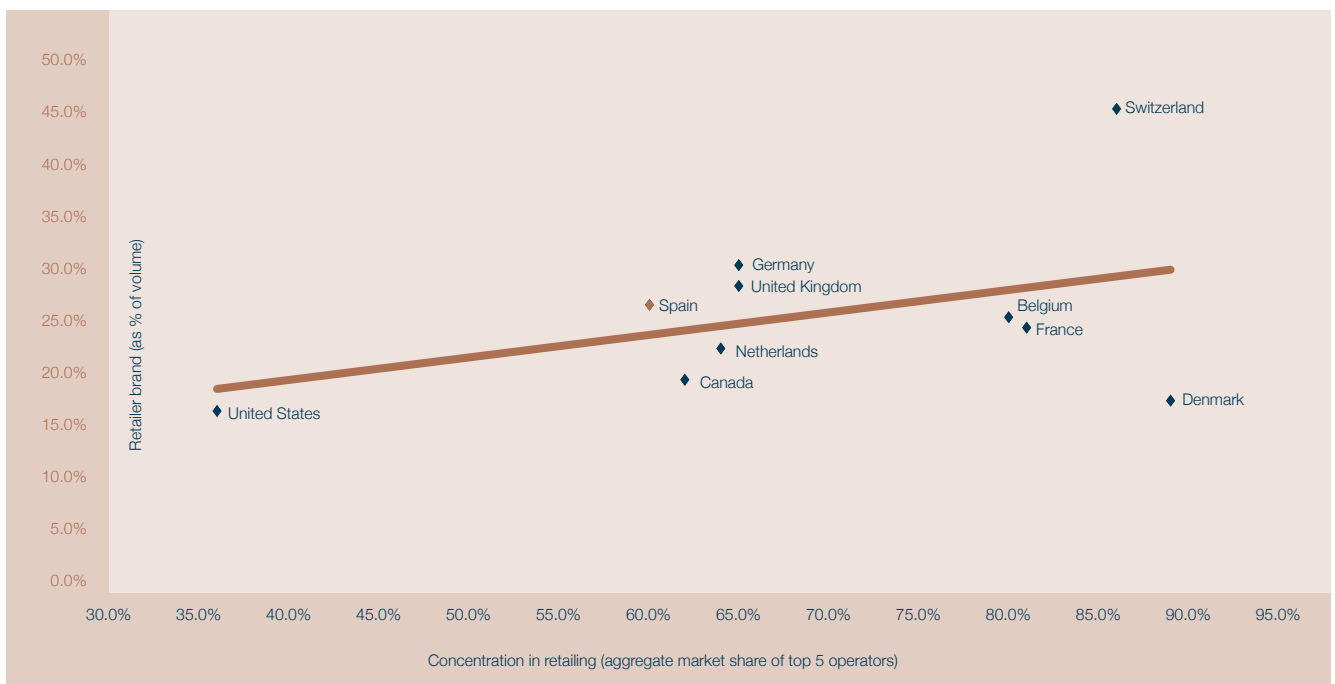
29 The share for Spain in this Figure differs from the one in Figure 6 for two reasons: because this Figure measures the level of ROB penetration in the FMCG market, which includes, apart from groceries, cleaning and perfume products, and because the data here refer to volume, not to the sales figures.

30 European Commission (2009), "Competition in the food supply chain", accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — *A better functioning food supply chain in Europe*, Brussels.

31 Steiner, R. L. (2002), "The nature and benefits of National Brand/Private Label Competition", working document presented at the *Annual Meeting of the American Economic Association*, Georgia.

characterised by a strong presence of retailer brands;³² the quality-price relation of ROB products, together with the continuous improvement in the perceived quality of these goods; and retailer interest in boosting their earnings and bargaining power versus their suppliers, in an ever more competitive environment, in which retail brands have become an essential competitive tool.

Figure 8
ROB market share and concentration in retailing, by country. 2005



Source: Prepared in-house using data from the MITYC. Boletín de Información Comercial Española, June 2008.

As already mentioned, growth in the ROB share normally quickens in economic recessions and slowdowns, as has been seen in the case of the Spanish economy in 1993-1994 and 2008 (Figure 6). The principal reason³³ is that the reduction in disposable income encourages consumers to replace manufacturer brands with the generally lower priced retailer brands. The cuts in advertising spending for manufacturer brands during the downside of the economic cycle also leaves room for greater penetration by ROB.

The introduction of ROB modifies both the competitive dynamic between retailers and their traditional function, which is no longer confined to distributing manufactured goods and is increasingly focusing on using retailer brands as an alternative to MBs. Retailer brands thus affect both relations between manufacturers and retailers, because the brands compete on store shelves to attract consumers, and relations between retailers, because the

32 UK Competition Commission (2007), "Working paper on the competitive effects of own-label goods", prepared for the report *The supply of groceries in the UK market investigation*.

33 Hoch, S. J. and Banerji, S. (1993), "When do private labels succeed?", *Sloan Management Review*, Summer, V. 34, num. 4.

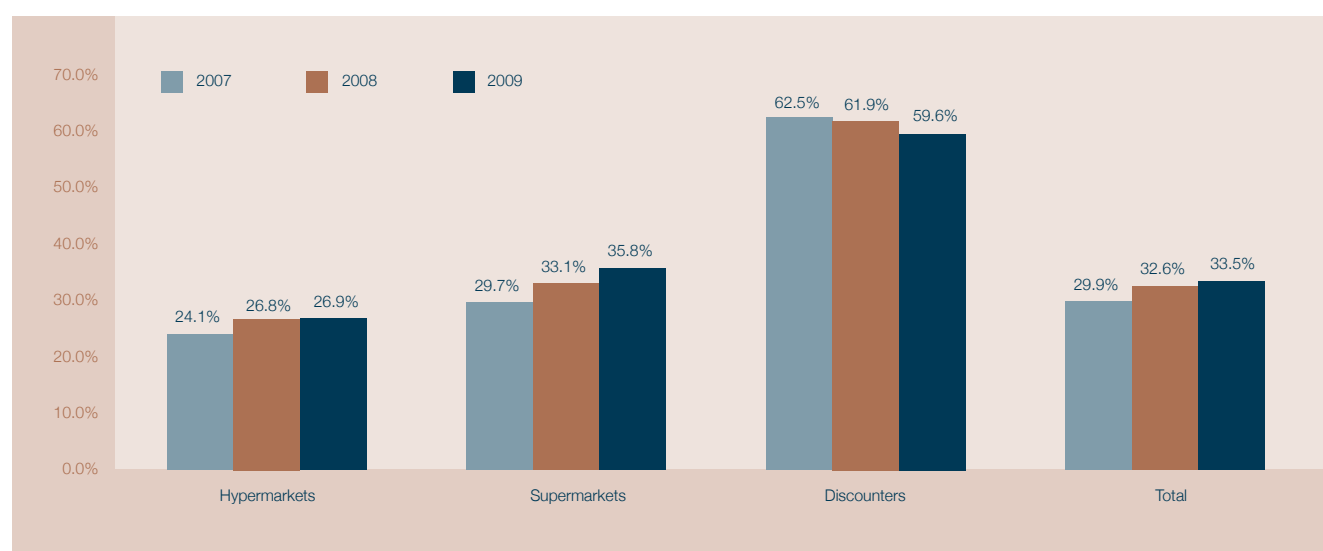
latter use ROBs as a new tool for differentiating themselves from their retail competitors.³⁴

2.3.2. Analysis by type of retail format

The relative weight of ROBs in retailers' sales varies by types of retail formats (Figure 9). Their share is especially high in discount stores (59.6% in 2009), and lower in the supermarket and hypermarket formats, at 35.9% and 26.9%, respectively.

The contribution of ROBs to the total sales of the leading grocery retailing companies (Table 10) to a large extent reflects each retailer's preferred format. Thus, ROBs account for a very large part of sales at Aldi (95%), Lidl (80%) and Dia³⁵ (50%), companies that do business in the discount stores segments, and have a smaller relative weight in the sales rung up by operators such as Mercadona (38%), Eroski Group (30%) and El Corte Inglés (16%).

Figure 9
ROB share of shopping basket value by format. 2007 - 2009



Source: Prepared in-house using data from the MITYC. Boletín de Información Comercial Española, August 2011.

³⁴ Bergès-Sennou F., Bontemps P and Réquillart V. (2004), "Economics of Private Labels: A Survey of Literature", *Journal of Agricultural & Food Industrial Organization*, Vol 2, art 3.

³⁵ The Dia supermarket chain belongs to the Carrefour Group.

Nevertheless, in recent years the penetration of retailer brands has intensified in the supermarket and hypermarket formats (Figure 9), especially in the segment of supermarkets larger than 1,000 m², where the ROB share grew from 2007 to 2009 at an average annual rate of 11.3%,³⁶ far higher than for supermarkets in the 401 to 1,000 m² segment (6%) and for those smaller than 400 m² (4%).³⁷

This trend is the inverse of the one seen in discount stores, where the ROB share declined from 62.5% to 59.6% between 2007 and 2009. This was largely the result of the aforementioned strategic shift by these operators toward a business model similar to the supermarket format, correcting the excessive weight of ROBs which may have been reducing shopper visits to those outlets. An example of this strategic rethink is seen in Dia, where the ROB share was cut from 70% to 50% between 2008 and 2010.³⁸

36 Data prepared using Alimarket (2010), *Especial MDD: Columna vertebral del lineal* (Special on ROB: backbone of shelf space), April.

37 Despite the general advance of retailer own brands in the top supermarket chains, there is one retailer who has pursued the opposite strategy, the supermarket chain Dinosol, which in 2010 announced it was reducing its own brand's space on store shelves, down to a maximum of 15%, clearly below the 22% share seen in mid-2008. (Source: Alimarket (2010), *Especial MDD: Columna vertebral del lineal* (Special on ROB: backbone of shelf space), April).

38 Source: Alimarket (2010), *Especial MDD: Columna vertebral del lineal* (Special on ROB: backbone of shelf space), April.

Table 10

Share of ROBs in sales of top grocery retailers. 2010

Retailer	retailer brand as % of sales	Examples of retailer brand
Aldi Supermercados, SA	95.0%	Aldi, Aldi Actual (only temporary articles)
Lidl Supermercados, SA	80.0%	Solevita, Bellaroom, Freeway, La Caldera, etc.
DIA, SA	50.0%	DIA
Mercadona, SA	38.0%	Hacendado
Grupo Eroski	30.0%	Eroski, Eroski Natur, Eroski Seleqtia
CC Carrefour, SA	25.0%	Carrefour, Carrefour Discount
Alimerka (Grupo)	23.0%	Alimerka
Covirán, SCA	22.0%	Covirán
Grupo El Árbol, SA	22.0%	Super, Super Premium, Super Basics, etc.
Dinosol Supermercados, SL	20.0%	Supersol
Miquel Alimentació Grup, SA	20.0%	Gourmet
Auchan (Grupo)	18.0%	Auchan
Condis Supermercats, SA	18.0%	Condis
Bon Preu, SA	17.0%	Bonpreu
Unide Sociedad Cooperativa	17.0%	UNIDE
El Corte Inglés (Grupo)	16.0%	ECI, Hipercor and Aliada
Consum Sociedad Cooperativa	14.0%	Consum

Source: Prepared in-house using data from the MITYC. Boletín de Información Comercial Española, August 2010, and websites of the retailers.

The information provided by the retailers in the survey carried out for this Report points to two additional trends. First, the increase in ROB share was not seen in all of the retailers surveyed, and that share actually declined in some regional retail distributors from 2006 to 2010. Second, ROBs have grown faster in retailers with nationwide reach than in those mainly focused on a specific region.

In summary, within the overall growth trend, the ROB share rose in supermarkets and hypermarkets and, conversely, declined considerably in discount

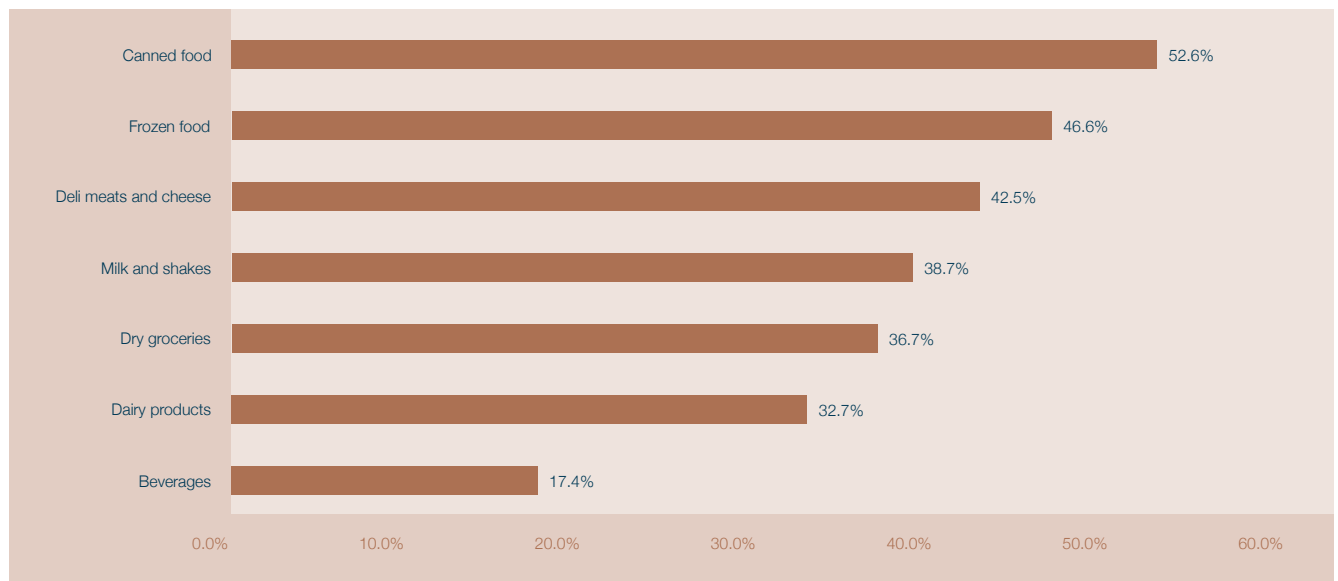
establishments, partly as the result of a strategic rethink by discounters in the face of competitive pressure from supermarkets.

2.3.3. Analysis by type of product

ROB penetration in the grocery retailing sector varies between the main product departments (Figure 10).³⁹ The largest market shares are recorded in canned groceries (52.6%), frozen foods (46.6%), and deli meats and cheese (42.5%), and the smallest percentages are seen in dairy products (32.7%) and beverages (17.4%).

Figure 10

ROB % share of total grocery sales in the main product departments. 2009



Within each of these departments, the importance of ROB also varies between product categories. For example, in the canned goods department, the ROB share tops 70% in peaches in syrup and in natural cooked legumes, while falling below 30% in products such as foie-gras, spreads and cockles. In turn, in some departments, like beverages and dry groceries, the penetration rate varies sharply by product, while in others, such as dairy products, milks and shakes, it is more homogeneous.

In 2009 the five products with the largest ROB share were salami (84.4%), vegetables (81.0%), peaches in syrup (79.9%), ice cream (77.7%) and sunflower oil (76.9%), and the five products with the smallest share were pastries (1.9%), patxaran liqueurs (8.0%), anisettes (8.4%), gin (13.6%) and sherry wines (14.4%).

³⁹ Nielsen uses the concept of department to refer to a grouping of goods.

Table 11

ROB share as % of volume, by main product categories, with largest and smallest penetration. 2009

Goods with biggest market share for retailer brands			Goods with smallest market share for retailer brands		
Product	Department	Retailer brand share	Product	Department	Retailer brand share
Salami	Deli meats & cheese	84.4%	Pastries	Dry groceries	1.9%
Vegetables	Frozen foods	81.0%	Patxaran liqueurs	Beverages	8.0%
Peaches in syrup	Canned goods	79.9%	Anisettes	Beverages	8.4%
Ice creams	Frozen foods	77.7%	Gin	Beverages	13.6%
Sunflower oil	Dry groceries	76.9%	Sherry	Beverages	14.4%
Empanadillas	Frozen foods	76.2%	Candies	Dry groceries	14.6%
Natural cooked legumes	Canned goods	75.5%	Rum	Beverages	15.9%
Atlantic mackerel	Canned goods	73.2%	Liqueurs	Beverages	18.2%
Summer sausage	Deli meats & cheese	73.1%	Whisky	Beverages	18.5%
Croissants	Dry groceries	72.9%	Cocoa powder	Dry groceries	19.6%

Source: Prepared in-house using data from the AC Nielsen 2010 Annual Report.

There are a number of factors that explain the differences in the level of ROB penetration between product categories:⁴⁰

- *The level of relative quality perceived by consumers*, which in turn depends on factors such as the type of technology required to make the product. In goods where the perceived quality difference between ROB's and MB's is small, the ROB share will tend to be relatively higher.
- *Degree of differentiation*, which affects the ROB's possibilities of entry in the market. In products with little homogeneity, the manufacturer's brand

40 See Hoch, S. J. and Banerji, S. (1993), "When do private labels succeed?", Sloan Management Review, Summer, V. 34, num. 4; Bergès-Sennou F., Bontemps P and Réquillart V. (2004), "Economics of Private Labels: A Survey of Literature", *Journal of Agricultural & Food Industrial Organization*, Vol 2, art 3; Semeijn, J., van Riel, A., Ambrosini, A. B. (2004): "Consumer evaluations of store brands: effects of store image and product attributes", *Journal of Retailing and Consumer Services*, 11 (2004) 247-258; UK Competition Commission (2007), "Working paper on the competitive effects of own-label goods", prepared for the report *The supply of groceries in the UK market investigation*. Australian Competition and Consumer Commission, (2008), "The role of private label products", in *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*.

is normally important for the consumer, and this tends to hinder ROB penetration.

- *Degree of consumer loyalty to manufacturer brands.* In certain products, such as sugared beverages, manufacturer brands may have won high levels of loyalty that will make it hard for ROBs to enter.
- *Promotional and advertising policies.* In products where manufacturer brands pursue aggressive promotional and advertising policies, those policies can act as a barrier to entry for new brands, including retailers' private labels.
- *Manufacturer overcapacity.* In industries with overcapacity, manufacturers will have more incentives to offer their services to retailers who want to develop their own private labels. In general, overcapacity tends to intensify competition between manufacturers to produce ROBs, helping to drive down the price at which retailers can make their brands.
- *Perceived functional risks.* This risk is associated with the consumer's perception of how difficult it is to make a product. The perceived difficulty may refer to diverse characteristics of the product, such as its ingredients or the technology needed for its production. In principle, the difficulty of making a product and the expected quality of the ROB are inversely related, so that ROB penetration tends to be lower when the perceived functional risk is higher.

All of these are determinants of ROB penetration in the different product categories. Normally, in categories with high relative quality, low level of differentiation or with overcapacity in the industry, ROBs will have a relatively larger impact. Conversely, in categories that require high R&D spending for production and where consumer loyalty to manufacturer brands is strong and advertising and promotion strategies of MB play an important role, then ROB penetration can be expected to be relatively lower.

The above factors contribute to explaining the pronounced differences observed in ROB penetration between products such as legumes, flour or sugar substitutes, with relatively large shares, and others such as beverages or dehydrated meals, where the shares are particularly low.

Over the decade of the 2000s, ROB penetration advanced sharply in deli meats and cheese (going from 13% in 2000 to 42.5% in 2009) and in dairy products (from 12.2% to 32.7%).

In the beverages department, however, its progression was clearly slower than in the rest of the categories (annual average growth of 5.8%). A variety of factors, such as high differentiation, strong consumer loyalty to manufacturer brands and the impact of the advertising strategies applied by manufacturer brands, may have kept retailer private labels from carving out a larger share in these categories.

Table 12

ROB grocery share as % of sales, by department. 2000 - 2009

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	Average growth (2000-2009)
Dry groceries	19.7%	20.4%	22.4%	24.1%	26.4%	27.9%	30.3%	30.4%	33.6%	36.7%	7.2%
Canned goods	25.5%	28.2%	31.3%	35.2%	36.7%	39.5%	40.9%	42.4%	46.4%	52.6%	8.4%
Milk and shakes	18.9%	21.3%	23.4%	26.3%	29.0%	30.8%	32.6%	34.1%	39.6%	38.7%	8.3%
Beverages	10.5%	10.7%	11.9%	12.8%	12.7%	13.0%	13.2%	13.6%	15.5%	17.4%	5.8%
Deli meats & cheese	13.0%	15.8%	19.6%	23.2%	25.4%	25.2%	26.2%	27.3%	33.1%	42.5%	14.1%
Frozen foods	23.3%	26.0%	27.8%	29.7%	31.1%	32.8%	33.0%	34.3%	37.4%	46.6%	8.0%
Dairy products	12.2%	14.2%	16.8%	18.5%	22.2%	24.8%	26.0%	26.6%	29.0%	32.7%	11.6%
Total Grocery	16.1%	18.1%	20.3%	22.2%	23.8%	25.0%	26.2%	27.0%	30.5%	33.7%	8.6%

Source: Prepared in-house from the AC Nielsen 2002 – 2010 Annual Reports.

By specific products, although the ROB share grew in the immense majority of the products analysed, there were also some setbacks in favour of manufacturer brands. In some cases, like canned pineapple and precooked corn, the ROB share declined considerably (Table 13).

Table 13

ROB grocery share, by products with greatest/smallest ROB growth. 2000-2009

Product	Share (2000)	Share (2009)	Average growth (2000-2009)	Product	Share (2000)	Share (2009)	Average growth (2000-2009)
Sausage	7.3%	67.6%	28.1%	Canned pineapple	52.0%	35.8%	-4.1%
Salami	10.9%	84.4%	25.5%	Precooked corn	50.4%	42.9%	-1.8%
Cured ham	7.9%	58.4%	24.9%	Croquettes	42.2%	36.3%	-1.7%
York ham	9.6%	68.7%	24.4%	Patxaran liqueurs	8.8%	8.0%	-1.1%
Sum. sausage	11.6%	73.1%	22.7%	Liqueurs	18.9%	18.2%	-0.4%
Fresh cheese	12.2%	51.5%	17.4%	Alcohol-free beer	35.4%	36.9%	0.5%
Vodka	10.3%	40.2%	16.3%	Anisettes	8.0%	8.4%	0.5%
Sugar sub.	20.1%	70.5%	15.0%	Toasted bread	48.5%	52.8%	0.9%
Atl. Mackerel	23.8%	73.2%	13.3%	Cockles	25.9%	28.5%	1.1%
Tuna	24.8%	72.0%	12.6%	Brandy	18.3%	21.6%	1.9%

Source: Prepared in-house from the AC Nielsen 2002 – 2010 Annual Reports.

As for pricing, the analysis by product type shows that products branded with the retailers' own label are cheaper, in practically all cases, than the manufacturer brands. In 2009, for a basket of 107 products, retailer brands were on average some 37.1% cheaper. Only in 2.8% of the goods was a MB priced lower than the ROB, and in more than 35% of the cases, the MB prices topped the ROB prices by more than 45%.⁴¹

2.3.4. Consumer habits

Products that carry a ROB have become very popular and very demanded by consumers. According to the Spanish Ministry of the Environment and Rural and Marine Affairs (MARM),⁴² some 87% of consumers purchased ROB products in 2011, up from 73% in 2004.

⁴¹ Source: AC Nielsen 2010 Annual Report.

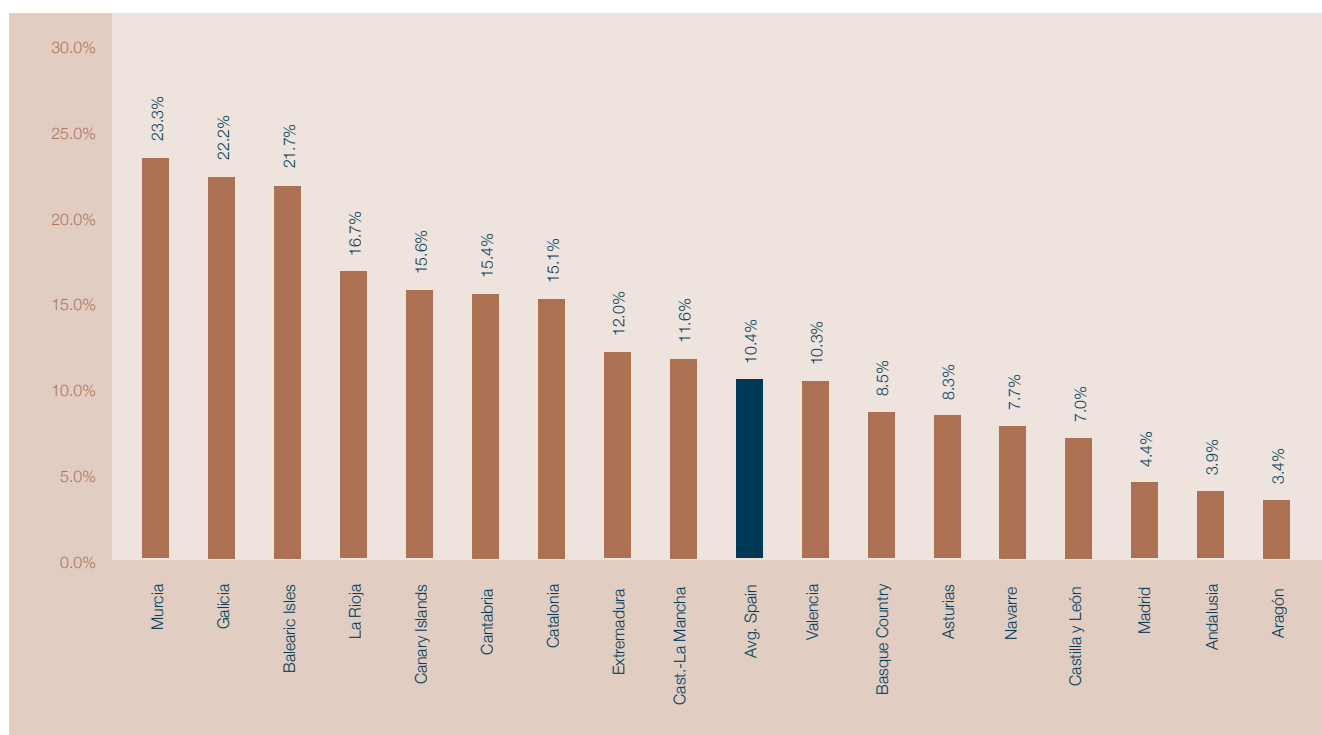
⁴² MARM (2011), *Monográfico de Monográficos* (Monograph of Monographs), study prepared by the MARM Observatory of Consumer Habits and Food Retailing, March.

ROB buying habits vary according to consumers' age and to the size of the local surrounding population. The population segment most inclined toward buying ROB products is people between the age of 20 and 35 years (93.3%), followed by those aged between 35 and 45 years (90.7%) and between 46 and 55 years (85.4%). Conversely, for those aged between 56 and 65 years and those aged 66 and older, these percentages drop to 84.2% and 75% respectively. People living in cities (more than 100,000 inhabitants) consume relatively more ROB goods than residents of smaller towns.

There are also differences in relation to the place of residence and the product category. According to the *Monográfico de Marcas de Distribuidor* (Monograph of Retailer Brands), published by the MARM in May 2009, Aragón, Andalusia and Madrid were the Autonomous Communities with the greatest preference for ROB products (Figure 11) while Murcia, Galicia and the Balearic Isles were the three regions with the least relative consumption of ROB products. Whereas more than 65% of consumers say they regularly buy ROB products in pastas, legumes, rice, dairy products (without including milk), milk and frozen foods (Table 14), this percentage is less than 45% in pastries and chocolate, sunflower oil, non-alcoholic beverages, beers and alcoholic beverages.

Figure 11

Percentage of consumers who state they do not buy ROB products, by region. 2009



Source: Ministry of the Environment and Rural and Marine Affairs (MARM). *Monográfico de Marcas de Distribuidor* (Monograph of Retailer Brands), May 2009.

According to the qualitative analysis carried out by the MARM in its May 2009 study,⁴³ consumers cite price as the fundamental factor driving their decision to buy ROB groceries, as they consider ROB are less expensive than the manufacturer brands and of similar quality. The consumers surveyed estimate they saved between 30% and 50% on their ROB product purchases.

As for the brands of specific retailers, consumers emphasise that the Dia and Hacendado labels are the best priced; Hacendado is considered a good brand in general, while Dia is well viewed in milk and yoghourts and Lidl in yoghourts and chocolates. The labels that stand out for their variety of ROB products are Mercadona and Hipercor.

Consumers believe retailer brands are reliable, because their products are submitted to the same checks, or even stricter, than the MBs, taking into account that the retailer supervises their production.

In the surveys which have been conducted to carry out this Report, the majority of manufacturers corroborate the consumers' view. Manufacturers indicate that the difference between ROBs and MBs in terms of quality and guarantees (ingredients, product formulations, etc.) vary according to the specifications given by the retailer for its ROB: in some cases the quality demanded by the retailer for its ROB can be the same as or greater than the MB.⁴⁴ The differences in labelling and packaging likewise depend on the product specifications, but the manufacturers who make both types of brands claim that they apply the same demanding controls in both cases.

43 MARM (2009), *Monográfico de Marcas de Distribuidor* Monográfico de Marcas de Distribuidor (Monograph of Retailer Brands), prepared by the Observatory of Consumer Habits and Grocery Distribution.

44 In this regard, OCU, a Spanish consumer's organisation, released a report in June 2011 analysing 47 whole milks. Two of the top three milks in the ranking were private labels.

Table 14

Percentage of consumers who regularly buy ROBs, by product categories and types of retail outlets. 2009

Product categories	Total	Hypermarkets	Supermarkets	Discount stores
Pasta	76.5%	74.1%	76.1%	82.8%
Legumes, rice	74.6%	67.7%	75.7%	82.8%
Non-milk dairy	72.3%	69.0%	71.7%	81.9%
Milk	68.9%	71.6%	65.7%	78.4%
Frozen foods	67.3%	65.9%	67.9%	67.2%
Vegetable conserves	58.1%	54.3%	60.9%	52.6%
Olive oil	57.0%	56.9%	54.9%	67.2%
Sausages and cold cuts	56.3%	53.4%	57.1%	57.8%
Fish conserves	51.0%	44.0%	53.3%	54.3%
Bakery/Viennoiserie/Pastry	50.4%	47.4%	52.9%	44.8%
Sweets/Chocolate	42.5%	41.8%	43.2%	40.5%
Sunflower oil	38.6%	34.5%	38.9%	45.7%
Non-alcoholic beverages	35.0%	31.9%	33.0%	50.9%
Beer	32.7%	28.4%	33.0%	39.7%
Alcoholic beverages	15.7%	10.3%	15.9%	25.9%

Source: MARM. Monográfico de Marcas de Distribuidor (Monograph of Retailer Brands), May 2009.

2.3.5. Retailer strategies in relation to retailer brands.

Retailers decide to introduce their own brand in certain product categories for several reasons.⁴⁵ Placing ROBs on store shelves can be a very effective commercial strategy, as it is a tool that allows retailers to satisfy consumer

45 According to the LSA/Fournier survey cited in Bergès-Sennou F., Bontemps P and Réquillart V. (2004), "Economics of Private Labels: A Survey of Literature", *Journal of Agricultural & Food Industrial Organization*, Vol 2, art 3, the main reasons why retailers develop private labels are to lower prices (33%), increase margins(25%), improve their position (18%) and strengthen consumer loyalty (16%).

needs at a lower cost than the manufacturer brands, while maintaining the diversity and quality of their product range.⁴⁶

In general, retailers introduce ROB's for different reasons:

- The main one is the **bigger profit margins** that a ROB will allow in a given category in comparison with the MBs in that category. The margins in most ROB categories generally exceed those obtained with MBs by between 25 and 30%,⁴⁷ due, in particular, to the fact that the marketing and promotion costs are those of the store itself and can be distributed over a large variety of products. This advantage is nonetheless limited, because given that the margin is obtained based on a price which is lower than the MB's price, and that the ROB's also tend to have slower rotation, it is doubtful whether beyond a certain ROB penetration threshold (around a 30% share) its growth could be beneficial for the retailer's overall profitability.⁴⁸ Also, in some product categories, the ROB's market share may not be large enough to compensate for the costs of launching it (in terms, for example, of the cost of managing stocks). But even in these cases, there are other indirect effects that may justify introducing and developing the private label.
- Notable amongst those indirect effects are the possible **improvement in the bargaining position of the retailer** vis-à-vis the MB supplier. By introducing ROB's, the retailer has its own supply alternative which it can use to press for an increase in its gross margins in the MBs. There may even be cases where the private label does not have commercial success and is not profitable in its own, but its mere presence in certain categories exerts a sufficiently credible threat to "discipline" the manufacturer brands, and thus paves the way for higher returns on the category as a whole.
- Furthermore, a ROB contributes to building **consumer loyalty**, which may lead to an increase in profits in all categories. All retailers offer their customers the same or similar MBs, but the ROB's of each retailer are sold, in principle, by that retailer only; their use thus allows for retailer differentiation beyond what may be derived from factors such as location, services offered, etc., which can build customer loyalty to the store and increase the likelihood that, once in the store, the consumer will also increase its purchases in other product categories as well. This is the effect that underpins, for example, the introduction of cheap ROB's in basic product categories to serve as a magnet for consumers.
- These two additional effects of ROB's, the enhanced loyalty and increased bargaining power, are interrelated.⁴⁹ Greater loyalty to a store gives the retailer more bargaining power vis-à-vis the MB supplier. The balance of power between the two sides is directly related to the relative loyalty consumers feel for the MB or for the retailers: if consumers are more willing

46 European Commission (2009), "Competition in the food supply chain", accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *A better functioning food supply chain in Europe*, Brussels.

47 Kumar, N. and Steenkamp, E.M. (2007), *Private label strategy*, Harvard Business School Press.

48 Kumar, N. and Steenkamp, E.M. (2007), *Private label strategy*, Harvard Business School Press.

49 Steiner, R. L. (1985), "The nature of vertical restraints", *The Antitrust Bulletin*, Vol. 30.

to switch brands within the same establishment than to change stores, then the retailer will be in a better negotiating position with respect to the manufacturer, and its profit margins over the MBS will tend to be relatively higher.

- The introduction of ROB's that are highly differentiated or in innovative products can also boost the retailer's overall profitability, by **attracting residual demand**, that is, consumers who were previously not in the market. When a new ROB is associated with innovative products, retailers actually contribute to identifying unsatisfied customer needs, so that these brands do not correspond to substitute products or to goods with lower quality and prices than the already existing MBs, but to new products.
- Other reasons for retailers to bring ROB's⁵⁰ out onto their store shelves are, for example, to increase their capacity to **control the product specifications and quality** and the **stability on the terms and conditions of their supplies**, through supply contracts that normally have a long duration.
- The ROB is also used as an instrument for competing against other retailers. For example, supermarkets are using the stepped-up development and penetration of ROB's to compete on price with the discount establishments.

Retailers develop different strategies, in terms of objectives, price, quality or shelf placement, for introducing their own brands, strategies which can be identified according to the main characteristics of the types of ROB's that they spawn. In general terms, four types of retailer brands have been identified: generics, imitation, quality and innovative. The first two types include the more traditional ROB's, which are also the dominant ones in the market. The two other types are more recent and steer away from the traditional image by putting more emphasis on quality positioning.

These four types of ROB's are analysed in detail below:⁵¹

- *Generic brands*. The objective of these brands, also called first-price brands, is to attract the most price-sensitive buyers, giving them a low priced option and thus widening the retailer's customer base.

They are characterised by being the cheapest brand within the category (from 25% to 50% less expensive than the leading brands) and the only reference they use is the name of the product (for example, bread or sugar). The low prices of these brands is explained both by the inferior quality with respect to the leader and because they are obtained from manufacturers with outdated technologies or excess capacity.

50 Australian Competition and Consumer Commission, (2008), "The role of private label products", in Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries.

51 Kumar, N. and Steenkamp, E.M. (2007), Private label strategy. Harvard Business School Press. A more exhaustive classification, differentiating between different ROB generations, can be found in Puelles, J.A. and Puelles, M. (2003), "Marcas de distribuidor más de 30 años de un proceso dinámico, competitivo e imparable" (Retailer brands: more than 30 years of a dynamic, competitive and unstoppable process), Revista Distribución y Consumo, May-June 2003, pgs. 55-71.

They cover basic functional product categories, are undifferentiated commodities, employ inexpensive packaging, have a lower quality than the MBs in the market and are not supported by advertising and promotion strategies. Given that they are normally used to compete against discount stores, they are usually located in the least visible parts of the stores, without entering into direct competition with the MBs.

Since 2008, in response to the economic crisis, several retailers have opted for rolling out second ROB, with lower price-quality than their first ROB and with features more similar to the generic brands (El Corte Inglés with *Aliada* or Carrefour with *Carrefour Discount*).

- *Imitation brands.* The strategy of these brands is to offer a product similar to the manufacturer brands ("me too") but with a more or less significant price savings (from 5% to 25% off the MB price). They normally use either the establishment's brand or specific brands by categories, and their quality is close to that of the manufacturer brands.

Given that the imitation brands take a follow-the-leader strategy with the manufacturer brands, their packaging is similar to the one used by brand leaders, they originate in categories where the leader's presence is intense and they are located on store shelves as close as possible to the top brand, in order to make it easier for consumers to compare and, on occasion, even confuse the two.

The strategy of offering comparable quality at lower prices is sustainable to the extent that the imitation allows a reduction in the cost of researching, developing and launching new products.

- *Quality brands.* The aim in this case is to offer value added goods to consumers, with a quality which is similar or superior to that of leading brands and at a price which is very close, the same price or even higher. Unlike the traditional types of retailer brands, the development of these private labels involves considerable effort to obtain better products with a technological level similar to or better than the one used by the leading manufacturers.

These brands usually cover categories that contribute to build the store's image, they are often used for fresh produce, and they are normally identified by the operator's brand plus its own sub-brand or category. The packaging is exclusive and it seeks to stand out, which explains why these brands are placed in attractive areas of the store.

This type of ROB includes those targeted at niche consumers or at very specific needs not covered by the manufacturer brands (ecological products, gluten-free goods, etc.).

- *Innovative value brand.* The objective of these brands is to deliver the best quality-price relation, build customer loyalty and achieve "word of mouth" dissemination.

They generally are priced from 20% to 50% less than the brand leader, cover all categories of the product, have similar quality to the leading brand, exclusive packaging and efficient costs, and are located throughout the store.

All of these brand strategies seek to propose a comparatively better quality-price relation than the manufacturer brands. In general, retailers do not confine themselves to a single strategy and can opt for several at the same time (for example: Alcampo with its *Primer Precio* and *Auchan brands*, El Corte Inglés with *Aliada* and *El Corte Inglés* and Carrefour with *Carrefour* and *Carrefour Discount*).

Chart 1 summarises the main characteristics of the private label strategies analysed, with some examples in Spain.

Chart 1

Private label strategies by key characteristics

	Generic brands	Imitation brands	Quality brands	Value innovation brands
Strategy	The cheapest undifferentiated	Copycat, at lower price	Value added	Better price-result relation
Price	Deep discount, 20% to 50% below the brand leader.	Moderate discount, 5% to 25% below the brand leader	Close to or higher than the brand leader	Deep discount, 20% to 50% below the brand leader
Quality comparison with leader	Inferior quality to the MB	Quality close to the brand manufacturers	Quality the same or better, advertised as better	Functional quality on par with brand leader, but without "no added value" product images and characteristics
Packaging	Cheap and minimal	Close as possible to brand leader	Exclusive and source of differentiation	Exclusive but cost efficient
Location	Poor; placed on least conspicuous shelves	Next to the brand leader	Prominent attention-getting placement	Normal and throughout store
Examples	Primer precio (Alcampo)	Eroski (Eroski); Caprabo (Caprabo); Auchan (Alcampo)	Carrefour Selección (Carrefour)	Aldi, Hacendado (Mercadona)

Source: Prepared in-house, Kumar, N. and Steenkamp, E.M. (2007), Private label strategy. Harvard Business School Press and Boletín Económico de Información Comercial Española, June 2008.

2.3.6. Types of manufacturers

A manufacturer may choose to produce only its own brands, follow a mixed strategy of producing retailer and manufacturer brands, or only make retailer private labels. The optimal commercial strategy for a manufacturer depends, amongst other factors, on the product category in question and on demand side conditions.

ROB manufacturers may, in turn, be classified into three main categories:⁵²

- *Large-scale manufacturers who opt for a mixed strategy of producing their own brands and private labels, whether for a single retailer or for several.* In this segment, the collaboration is normally carried on via manufacturer-retailer agreements to provide the private labels, thus allowing the retailer to use the knowhow acquired by the manufacturer.
- *Small and medium enterprises who specialise in particular product lines and concentrate almost exclusively on producing private labels.*
- *Major retailers and wholesalers who operate their own manufacturing plants via vertical integration.* This option is uncommon in Spain.

In recent years a new type of manufacturer has emerged, known as “hidden giants”. Hidden giants are manufacturers specialised in producing private labels for various retailers, although there are a few exceptions of production for their own MB as well, generally in niche or highly specific markets. Some of them have grown quickly in a context of sector concentration, and have become multinationals in their product category (Sovena in cooking oils, Senoble in yoghourts, etc.), although their name is not normally known to the general public.

Hidden giants normally respond to the invitations extended by the major international retailers to bid on ROBs. Their comparative advantage is their large size, which allows them to be very price competitive. The key drivers behind the growth of these hidden giants are, in particular,⁵³ the downward price pressure required by ROBs, as well as the growth of economical product lines, the existence of ranges common to different countries and the development of reverse auctions.⁵⁴

In Spain some two-thirds of the 100 top food and beverage companies and groups dedicated part of their production to retailer brands.⁵⁵ And there are

52 Bergès-Sennou F., Bontemps P and Réquillart V. (2004), “Economics of Private Labels: A Survey of Literature”, *Journal of Agricultural & Food Industrial Organization*, Vol 2, art 3.

53 Puellas, J. and Puellas, M. (2008), “Marcas de Distribuidor (MDD): 100 ideas clave. Iniciativas empresariales más novedosas a nivel mundial” (Private labels: 100 key ideas. Most innovative corporate initiatives at global level), *Revista Distribución y Consumo*, July-August 2008, pgs. 241-256.

54 The term reverse auctions is normally used for auctions organised by buyers of a good or service in which suppliers compete to sell goods or services to a single buyer. The closer the products are to the category of commodities, the more these auctions, because they are focused on price, have fostered the proliferation of “hidden giants” whose size allows them to offer lower prices.

55 Federación Agroalimentaria de la Unión General de Trabajadores (UGT) (2010), *Análisis de las condiciones laborales de las empresas agroalimentarias de mayor facturación en España* (Agri-food Federation of the General Union of Workers — Analysis of labour conditions in the biggest selling agri-food companies in Spain).

many small and medium manufacturers who, with or without their own brand, produce nearly exclusively for a single retail distributor. More recently, there has been important growth in companies that also produce for ROB exports (for example, Zumos Antonio Muñoz and Grupo Siro).

The mixed strategy affords manufacturers several advantages:⁵⁶

- The results obtained in the surveys of manufacturers corroborate that the costs are normally lower than in the case of manufacturer brand production. The promotional and commercial costs are very low or nil because they are borne by the retailers, and distribution and logistics expense are also lower. The costs of developing and making the product can be lower than those of producing own brand products, depending on the specifications required by the retailer. Manufacturers also point to the competitive advantage reaped by ROB on not having to pay royalties or other types of payment such as the product replenishment costs associated with MBs.
- Producing for ROB offers the possibility of using idle manufacturing capacity and exploiting economies of scale.
- For small and medium operators, producing retailer brands may in some cases be the only possible way of penetrating certain markets, expanding their production capacity and capturing economies of scale.
- ROB supply contracts between manufacturers and retailers normally have a long term character, which ensures the former greater stability in the demand for their products and hence in their revenue streams and production volumes. Breaking off relations with the manufacturers of their ROB carries greater costs for retailers than breaking off relations with the MB suppliers, which also contributes to more stable relations. Three out of every five retailers surveyed said they maintained in 2010 more than 40% of their ROB suppliers from 2003. A mixed strategy also allows producers to better manage the risk of their product portfolio associated with fluctuations in demand, which helps foster innovation and the development of new products.
- Making ROB for a single retailer may be advantageous for the manufacturer, by possibly opening the door for also selling MBs to that retailer, given the closer relation that the manufacturer has with the retailer in comparison with other producers.
- By maintaining closer relations with the retailer, the ROB producer can have greater access to inventory management information for different categories,⁵⁷ as well as to information on the socio-demographic traits and habits of consumers, for example, through the information obtained by the retailer through the loyalty cards. This privileged access to the information can allow the manufacturer to plan more efficiently and better adapt to consumer requirements in the production of its own brand.

⁵⁶ Morris, D. and Nightingale, J. (1980), "Why should firms manufacture retailer brands", *Managerial and Decision Economics*, Vol. 1, N°3.

⁵⁷ International Markets Bureau (2010), *Global private label trends, market analysis report*, Canada.

In the short term, this phenomenon can give rise to gains in total and consumer welfare, provided there is enough competition among retailers. In the long run, however, the effects are ambiguous.

Indirect advantages of this kind may explain why many manufacturers have decided to produce ROB for a retailer, even though the margin generally obtained with those products is generally quite narrow and despite the risks those ROB pose for their own brands. Those risks are:

- The manufacturer loses control over part of its output (above all in terms of price and image) because it is the retailer who determines the final product specifications and conducts the quality control.
- The mixed strategy may entail greater dependence on the retailer, with the consequent negative effect on the producer's bargaining power in the agreements with the retailer for supply of the manufacturer's own brand. This risk is all the greater when the manufacturer produces ROB for a single retailer and that production represents a large percentage of its overall output.
- Producing ROB can also harm the consumer's perceived image of the manufacturer's brand. The advertising campaigns carried on by different MBs that emphasise that their manufacturer "does not produce for retailer brands" supports the relevance of this risk. Some practices carried on by retailers, such as "copycat packaging"⁵⁸ may heighten this risk, because, given the similarity in terms of packaging, the consumer may believe that both products are made by the same company.

The risks associated with the mixed strategy and, in particular, the erosion of image, have a stronger deterrent effect for the more prestigious brands, some of which prefer to avoid these risks by passing up on the ROB production option. The leading brands, moreover, do not usually have excess capacity they can use to make ROB and, if they are leading-edge brands characterised by a high degree of innovation, they may even expose themselves to transferring their knowhow to the retailer if they make private label products for the latter.⁵⁹

On the other hand, for local or regional medium and small manufacturers, producing ROB can be a very interesting option. These companies generally make manufacturer brands whose risk of being dropped by retailers is greater than for brand leaders. In some cases, a mixed strategy, or even conversion into a ROB producer, can therefore offer an alternative to disappearing from the market.

⁵⁸ This term refers to packaging ROB similarly (in size, colour, logo) to the MB packaging.

⁵⁹ Fernández, A. (2010), "La situación actual de las marcas de distribuidor desde la perspectiva de los fabricantes: un estudio cualitativo" (The current situation of private labels from the standpoint of manufacturers: a qualitative study), *Distribución y Consumo*, September-October 2010, pgs. 24-35.

2.4.

The bargaining power of retailers

The developments seen in the Spanish retail distribution market and, specifically, the growth in ROB's market share and increased concentration in the retail sector, have strengthened the bargaining power of retailers. In the short term, this phenomenon can give rise to gains in total and consumer welfare, provided there is enough competition among retailers. In the long run, however, the effects are ambiguous, because a higher bargaining power may have negative effects on interbrand competition, on intrabrand competition and on the incentives of manufacturers to invest and innovate.

2.4.1. Buyer power as bargaining power

In general terms, buyer power is the capacity a buyer has to influence the terms and conditions on which it acquires products.⁶⁰ In the economic literature there are two ways of understanding and analysing buying power.⁶¹

One is to consider buyer power as **monopsony power**, a context in which upstream and downstream business interact in a market and a buyer may have upstream market power. In this case, buyer power is analysed similarly to market power. Much the same way as sellers with market power can raise the market price by curbing supply, buyers may bring down purchasing prices of an input by restricting demand. A lowering of purchase prices benefits other buyers, but it also imposes the harm to society inherent in bringing output down to below the level of a competitive market.

On the other hand, buyer power may refer to **bargaining power**, that is, to the strength of a buyer's position in the negotiations with its suppliers. Buyer bargaining power can reduce purchase prices without reducing the amounts they acquire or the amount traded in the market, because the mere threat of cutting down on purchases or of switching suppliers can be enough to improve the trading terms, which may be beneficial for the end consumers.

Conceiving of buyer power as monopsony power is more appropriate for commodities markets, which are characterised by having a uniform price and where buyers and sellers interact on the basis of fixed trading rules. Describing buyer power as bargaining power is better suited to markets where there are relatively few companies upstream and downstream, for example, major retailers and large-scale manufacturers, and the terms and conditions of supply are set in bilateral negotiations. Unlike what happens in a monopsony context, in these markets buyers negotiate individual discounts and there can be large differences between the prices paid by one retailer or another. In theory, the scenario that best reflects the lion's share of the relations between retailers and their suppliers is to view buying power as bargaining power.

⁶⁰ OECD (1998), *Buying Power of Multiproduct Retailers*, Policy Roundtables Document.

⁶¹ Inderst, R. and Mazzarotto, N. (2007), "Buyer power in distribution", chapter for the *ABA Antitrust Section Handbook: Issues in competition law and policy*.

2.4.2. Sources of bargaining power

Bargaining theory predicts that buyers will only be willing to accept a contract with sellers if the price is the same or lower than the outside options (other sellers or vertical integration). Similarly, sellers will only be prepared to sell if the price is above or at the level of their other available options (alternative selling channels such as horeca, exports, other retailers, etc.).

In a bilateral negotiation context, the factors that give the retailer buying power are those that affect the feasibility of alternative supply sources or of vertical integration (the non-negotiated options) and its degree of dependence on the suppliers with whom it negotiates.

The economic literature has identified a series of factors that affect the bargaining power of buyers, which in this case have been referred to a situation of commercial relations between suppliers and retailers:⁶²

2.4.2.1. Retailer size

The retailer's size can be a key determinant of its bargaining power. A retailer with sufficient size can make a credible threat of upstream integration or of switching to another supplier, even though the latter course may involve significant fixed costs, such as those associated with researching alternative suppliers or sponsoring the entry of competitor suppliers, whether by sharing the new entrant's costs of establishment or giving assurances for part of its sales.

In addition, a significant size can provide a retailer with better knowledge of the market and with greater capacity to design and implement more competitive supply arrangements, such as auctions.

2.4.2.2. The retailer as “gatekeeper”

The degree of market power wielded by a retailer as downstream seller in a local market can affect the supplier's alternatives and its bargaining power vis-à-vis that retailer. If a retailer faces little or no competitive pressure in a local market, the supplier's alternatives for reaching consumers there decrease. That is why for the supplier the sales made through a monopoly retailer in its local market will generally be more difficult to replace than those carried on through a larger retailer operating in a highly competitive market.

Conversely, for a retailer with market power in a local market, the costs of having a more limited assortment of products, or of dropping a brand or range of products of a brand, are not as large, because consumers in that local market have fewer possibilities of obtaining those goods from another retailer.

62 Inderst, R. and Mazzarotto, N. (2007), “Buyer power in distribution”, chapter for the ABA *Antitrust Section Handbook: Issues in competition law and policy*; OECD (1998), *Buying Power of Multiproduct Retailers, Policy Roundtables Document*; OECD (2008), *Monopsony and Buyer Power, Policy Roundtables Document*; Australian Competition and Consumer Commission (2008), *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*.

The developments seen in the Spanish retail distribution market have strengthened the bargaining power of retailers.

For the supplier, not being present in a given local market might not imply significant costs if that local market has a limited scope. However, where the retailer has an important position as seller in a large number of local markets, or in very extensive local markets, the cost for the supplier of dispensing with that retailer is larger. In the case of retailers who carry on centralised negotiations, their position as “gatekeepers” in a relatively large number of local markets allows them to improve their overall purchasing terms, that is, not just those for the products targeted at the markets where they are dominant.

2.4.2.3. Relative dependence

Another source of bargaining power is the relative degree of dependence of the parties in the commercial relationship. Where the relation is of considerable importance for the supplier but much less so for the retailer, the retailer will have greater bargaining power. This difference may stem from the existence of an important asymmetry in the expected impact for each if the contract is cancelled. If the retailer has less to lose from such cancellation, whereas the impact for the supplier is considerable, then the latter will be more vulnerable to the threat of breaking off the relationship, and this threat will be all the more credible the smaller the harm it could be expected to cause to the retailer.

In this regard, the OECD⁶³ emphasises that one critical factor in the relative bargaining power of the parties is the difference in the relative amount of losses associated with a breakoff of their relation. For example, if ending the trade relationship means a decrease in profits of 0.1% for the retailer, but a 10% drop for the supplier, the buyer will probably wield buying power.

2.4.2.4. Penetration of retailer brands

The presence of retailer private labels contributes to increasing retailer buyer power. First, ROBs give them an alternative source to replace products from a particular supplier. Second, introducing, or the threat of introducing ROBs, can help counteract the manufacturer’s power because the private label exerts competitive pressure on other brands. Third, private labels give the retailer information on the manufacturing industry, in terms, for example, of production costs and technologies, which will allow the retailer to improve the conditions it negotiates with its suppliers. Fourth, as explained in the preceding sections, given that a retailer private label increases the differentiation between retailers, it also increases the bargaining power of each of them to the extent that its own brand contributes to strengthening the loyalty of the retailer’s customers and thus makes them more reluctant to shop in another establishment.

2.4.2.5. Upstream competition

If there are many suppliers, the retailer will wield greater bargaining power. Conversely, if there are few readily available supply alternatives, that power will be lessened. For example, in products that have become commodities and where there are no essential “must have” brands, the retailer’s bargain-

63 OECD (2008), *Monopsony and Buyer Power*, Policy Roundtables Document.

ing power will be greater than in the case of highly differentiated products or products where industry concentration is high.

2.4.2.6. Consumer habits

The impact of a breakdown in the commercial relationship between the parties also depends on how consumers react when they find that a particular product is no longer available at their usual shopping venue. If shoppers decided to replace the missing product with other brands stocked by the store, the retailer may end up not bearing any cost from the end of the relationship, in which case the supplier may face a significant loss of volume. If the consumer, however, decides to switch to another store to find the product that has been dropped, then the retailer may suffer losses, in which case its negotiating power will be weaker.

2.4.3. Bargaining power: situation in Spain

The trend seen in the grocery retailing sector in Spain in the last few decades has led to an increase in the bargaining power of retail distributors.

This has been the result, first of all, of the growing concentration in the sector, as described in the previous chapter of this Report, and of the increase in size of the main retailers in relation to their suppliers that has been seen across all product categories studied.

Second, there is a certain amount of regional specialisation in the main retailers. This favours the emergence of gatekeepers for certain local markets, a factor that can bear greater importance for bargaining power in the case of products that are primarily consumed in a particular region. Increased concentration has also been seen at the regional and local levels.

Third, as has also been analysed above, the ROB share has recorded notable growth, going from 6% in 1990 to 34% in 2009, in nearly all product categories. Generally speaking, the increased presence of private labels helps strengthen retailers' bargaining power versus their suppliers, although it is true that in certain categories the growth and current importance of ROB and their future growth prospects are much more limited.

Fourth, Spanish retail distributors now also have a greater capacity for obtaining ROB at the international level, much as also occurs in other countries.⁶⁴ For example, a major Spanish retailer, Eroski, and a group purchasing organisation, Euromadi,⁶⁵ belong to an international retail alliance, whose functions include looking for private label suppliers for its members. This increases the alternatives for retailers and hence their bargaining power, while also fostering the development of group purchasing organisations at the national level as a means of boosting retailer competitiveness by capturing economies of scale in logistics and distribution.

⁶⁴ UK Competition Commission (2007), "Working Paper on Buyer Power", prepared for the report *The supply of groceries in the UK market investigation*

⁶⁵ Eroski belongs to the international alliance Alidis and Euromadi to Euro Marketing Distribution. Source: IGD. *The food and grocery experts*

Fifth, the retail channel has gained in importance as a distribution channel versus other alternative channels, such as horeca. The structure of grocery spending varied from 2003 to 2009, with a rise in spending by households (from 73.1% to 74.7%) and institutions (from 1.8% to 3.0%) at the cost of the horeca channel, whose relative weight declined from 25.2% to 22.3%. Nevertheless, retailer bargaining power will tend to be lower in some products in which the retail channel is not as important.

Sixth, the relative dependence of suppliers seems to have increased, judging from the data obtained in the survey carried out for this Report. The survey asked manufacturers of eight selected product categories about retailers who accounted for 10% or more of their sales in each of the categories. Taking that percentage as indicative of manufacturer dependence on that retailer, the results shown in Table 15 point to an increase from 2003 to 2010 both in the percentage of dependent suppliers and in the percentage represented by the dependent revenues⁶⁶ with respect to total sales of all manufacturers included in the aggregate of the categories considered in the analysis.⁶⁷

Table 15

Evolution and impact of relative dependence of manufacturers from 2003 to 2010

	Year	% Dependent revenue	% Dependent manufacturers
Total	2003	25.8%	65.6%
	2010	38.2%	83.0%

Source: Prepared in-house using data from survey of manufacturers.

As can be seen, the percentage of dependent manufacturers —that is, those with a least one retailer that accounts for more than 10% of their revenues— grew between 2003 and 2010 to reach 83%, the percentage of total manufacturers surveyed who may be considered dependent according to this yardstick. The relative weight of dependent revenues in the total sales of the eight categories analysed also grew, going from 25.8% to 38.2% of the revenues analysed in the sample for the 7-year period.

66 A manufacturer's dependent revenues are its sales to retailers on whom it has a relation of dependence, that is, who absorb 10% or more of the manufacturer's net sales in a product category. For example, if manufacturer S has total sales of €1,000 in product category Z and its retailers include one to whom it sells €200, another that buys €300 and several others of which none account for more than €100, then its dependent revenue is the sum of sales to the first two (who respectively absorb 20% and 30% of the manufacturer's sales in category Z), that is, €500.

67 This percentage is calculated by first obtaining the dependent revenue of each manufacturer in each category, then summing up those amounts to obtain the dependent revenue for that category. The dependent revenue in each category is then added up and divided by the total aggregate sales in the eight product categories analysed for the year in question.



The existence of various barriers to entry and expansion heightens the bargaining power of the retailers already entrenched in the market.

Seventh, in relation to consumer habits, not only do the available data point to a growing popularity of ROB's, they also appear to indicate a majority trend amongst consumers to switch brands when they find that a particular establishment does not have the brand they are looking for, a development that tends to strengthen retailer bargaining power. According to a MARM study,⁶⁸ 70% of the consumers surveyed do not switch establishments if they find their store does not carry the MB they are looking for: 32.9% opt to buy the retailer's own brand instead, 26.9% buy another manufacturer's brand, and 10.3% do not buy the product.

Eighth, the growing relative importance of the medium and large super-markets format to the detriment of the hypermarket has also contributed to enhancing the bargaining power of the major retailers, because the decrease in the average store size also reduces each establishment's possibilities of carrying a variety of products and the number of brands on the shelves. These factors favour the retailer's bargaining power with manufacturers in two ways: because they diminish the retailer's need to stock several brands on the store shelves, to the extent that the assortments found by consumers in most establishments are more limited; and because unlike what occurs with competition between hypermarkets, which is primarily based on prices and the availability of goods on store shelves, competition between super-markets is based more on their proximity to the end customer, and the question of whether or not they have the full complete assortment of brands on their shelves has a smaller impact for these purposes.

Lastly, the existence of various barriers to entry and expansion heightens the bargaining power of the retailers already entrenched in the market. Notable amongst those barriers are, first of all, the ones associated with numerous regulatory obstacles, including licences to set up commercial outlets, the laws on store hours, the ban on selling at a loss and the zoning restrictions on retail areas included in many urban plans. Other barriers refer to the economic ones, such as the existence of sunk costs and economies of scale, the limited availability of retail area, and what is known as reputational capital; and there are also strategic barriers to entry associated with certain commercial practices of the major retailers which may give rise to constraints on intrabrand competition.

2.4.4. Consequences of the increased bargaining power of retailers

This section analyses the main effects which may be caused by a rise in retailer bargaining power vis-à-vis their suppliers from the standpoint of the end consumers, in both the near and long term.

2.4.4.1. Improved purchasing terms for retailers

The most immediate effect of the increase in retailer bargaining power is to improve the terms on which they acquire goods from their suppliers. The improvement may take the form of a direct decrease in prices or of other

⁶⁸ MARM (2009), *Monográfico de Marcas de Distribuidor (Monograph of Retailer Brands)*, prepared by the Observatory of Consumer Habits and Grocery Distribution.

advantages in the commercial relationship, such as receipt of “off-invoice” rebates, modification of delivery or payment calendars, closer working ties, assumption of costs of breakage and others, etc., all of which may affect consumer welfare.

Greater retailer buyer power can also mitigate the harm caused by situations in which there is little real competition between manufacturers, offsetting the market power that certain manufacturer may have built up in sectors with little interbrand competition.

For these reasons, in a context of competition between retailers, buyer power tends to be pro-competitive.⁶⁹ In principle, if the degree of competition between retailers is sufficient, part of the profits obtained by retailers from their increased buyer power are passed onto the end consumers, in the form of lower prices, higher quality and variety or better pre- and post-sale services, although the diversity of ways in which these benefits are passed on makes it difficult to make a precise estimate of the amount of consumer savings generated.

Competition between retailers must be real and sufficient. If the increase in retailers’ buyer power versus suppliers is accompanied by increased retailer market power downstream vis-à-vis end consumers, then consumer welfare may not necessarily improve, as the end prices may remain unchanged or even rise.⁷⁰ In these circumstances, a rise in the overall social welfare is only possible if the greater market power of retailers is offset by the gains in terms of efficiency due to the reduction in supply costs.

Without prejudice to the difficulties mentioned above for measuring the effects of the increase in retailer buyer power, the available indicators point to certain signs that in Spain part of the improved terms obtained by retailers is being passed on to consumers, although this has been slowing in recent years.

In fact, as depicted in Figure 12, the net operating margins in grocery retailing⁷¹ are relatively small, in comparison with those obtained in retail commerce in general, and trended downward in the period analysed.⁷²

69 European Commission (2009), “Competition in the food supply chain”, accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — *A better functioning food supply chain in Europe*, Brussels.

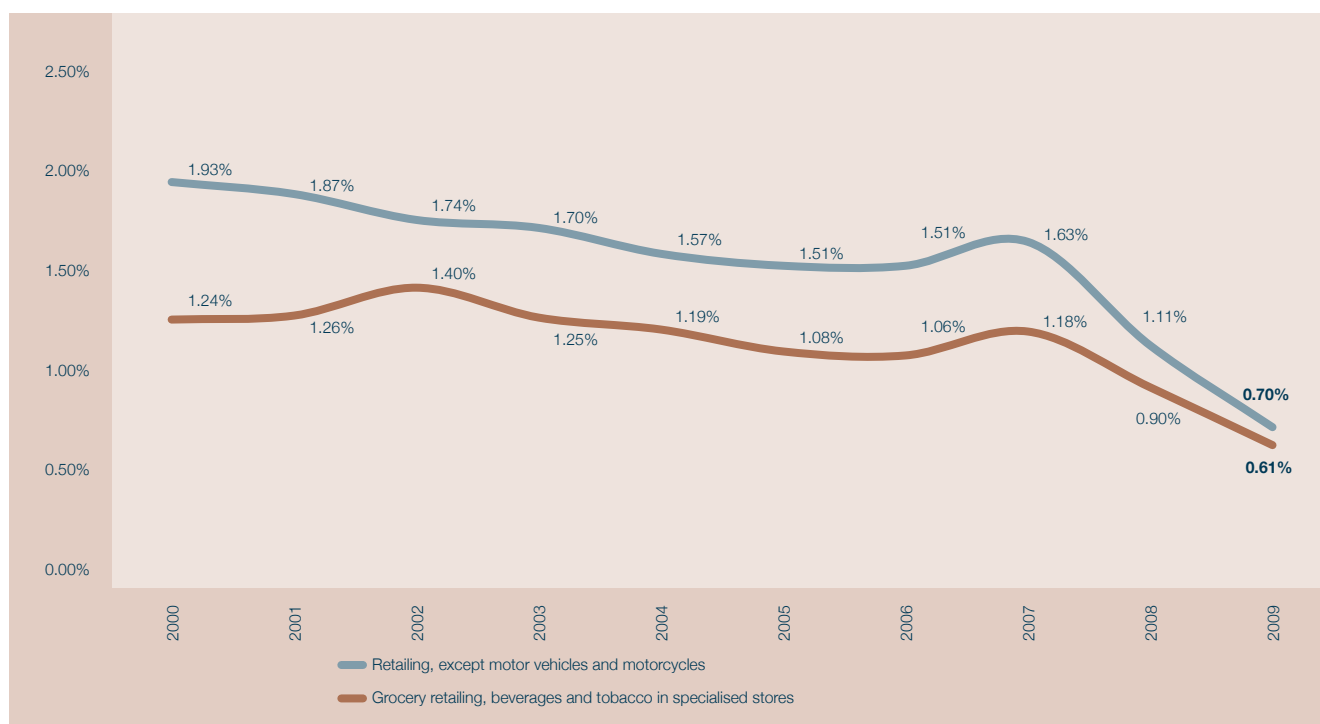
70 OFT (1998), *The Welfare Consequences of the Exercise of Buyer Power*, prepared by Paul Dobson, Michael Waterson and Alex Chu for the OFT.

71 Margin indicators must be interpreted in the context of a business in which product turnover is fundamental. Thus, low unit margins may disguise what are actually large total profits.

72 To analyse the trend in grocery retailing net margins we used as proxy the data released by the Bank of Spain on the evolution of net margins in retailing of food, beverages and tobacco in specialised stores.

Figure 12

Comparison between the evolution of percentage net margins in retailing in general and in food, beverages and tobacco sold in specialised stores. 2000-2009



Notes: a) net margin is calculated by dividing net profit by net revenue and is expressed as a %; b) the margin data are averages for the sector.

Source: Bank of Spain. Central Balance Sheet Date Office. Sector ratios of non-financial businesses.

Nevertheless, a progressive convergence is also seen between grocery retailing margins and margins for the retail sector as a whole. Given that the retailing business is based on high product turnover, this may indicate that the intensity of competition in food retailing, though strong, is weakening in comparison with what exists in Spanish retail commerce as a whole.

This possibility is not incompatible with the sporadic price wars that can take place between the major players in times of economic crisis, such as the one triggered in Spain in mid-2009 by Carrefour's announcement of 25% price cuts in 10,000 products, and intensified since then with aggressive price-cutting strategies by the big retailers.

Another indicator of the changing conditions of competition in this sector is the drastic shift spawned in recent years by the strong expansion of what is now the leading grocery retailer in Spain, Mercadona, whose market share over the sales of the major retailers rose eight percentage points from 2004 to 2008.

2.4.4.2. Lowering of production costs

As analysed in the first part of this chapter, with the exception of certain very specific product categories, ROBs tend to be less expensive than the leading manufacturer brand, so their introduction in a category can lead to a reduction of the average price for those products that is not a direct result of greater buyer power.

The main reason why ROBs are priced lower is that the costs entailed in their production and sale are less than for MBs thanks, amongst other factors, to economies of scale and lower marketing and promotion costs. In their replies to the survey, manufacturers confirmed that those retail price differences are due to the lower costs of ROB goods, but they also pointed to the mark-ups applied by retailers to the two product types, with an “artificial” reduction of ROB prices to facilitate their introduction in stores. Also, by allowing retail distributors to participate directly in production, private labels reduce the need for intermediaries and thus rationalise the food supply chain.

In addition, in the short term, the introduction of ROBs usually intensifies competition between manufacturers (interbrand competition), to which the latter often react by cutting prices, a strategy that is more immediately available than other alternative like trimming production capacity or boosting innovation.

The passing on of the effects of heightened interbrand competition to consumers also depends on the intensity of competition between retailers, although in this case retailers may have an additional incentive for thus benefiting consumers, in view of the possibility of expanding their customer bases by attracting shoppers to the MBs whose prices has been cut.

Figure 13 gives a comparison of the average growth in prices and the average market share of private labels in 18 product categories⁷³ in the period 2000-2009 in Spain. These data seem to indicate that the two variables are inversely related, albeit not markedly so: the average rate of price increases was lower in the categories with the largest average ROB share in 2000-2009. This would appear to mean that, at least for the time being, the efficiency gains are being passed on to buyers.

73 Those categories are: herbal teas, cookies, breakfast cereals, pasta, rice, dry legumes, snacks, nuts and dried fruit, liquid milk, milk shakes, horchata (purple nutsedge) drinks, mineral waters, fresh cheese, prepared dishes, ice cream, prepared deserts, butter, margarine.

Figure 13

Average growth in prices and market share of private labels for 18 product categories in 2000-2009



Note: The growth in prices refers to the price increases in the category.

Source: Prepared in-house using data from AC Nielsen.

Although the entry of retailer private labels in a product category will normally lower prices there, its impact will vary by product, due in part to the different strategies that may be adopted by retailers and by manufacturers in relation to the prices of manufacturer brands.

As already pointed out, retailers may decide to manipulate the price structure of the category, making the MBs relatively more expensive as a means of paving the way for introducing the ROB. Many of the manufacturers consulted believe that “cross subsidising” by the retailer, that is, raising MB prices in exchange for smaller or even zero margins in ROB, is a relatively common practice in the sector. Also, it may occur that a manufacturer will respond to competition from the private label by focusing on the segment in which its product commands the greatest loyalty, that is, where demand is the most inelastic, foregoing price competition with the ROB and increasing the prices of its MBs. The net result for MB prices will depend, amongst other factors, on the play between these upward price tensions and the downward pressure caused by the greater buyer power of retailers and by competitive pressure from the ROB.⁷⁴

74 The results of the empirical studies carried out on this question are not completely conclusive. Some articles in the literature find evidence that MB prices increase as ROB development advances (Bontemps, C., Orozco, V. and Réquillart, V. (2008), “Private Labels, National Brands and Food Prices”, working paper of the *Institut d'Économie Industrielle de Toulouse*; Ward, M., Shimshack, J., Perloff, J. and Harris, M. (2002), “Effects of the private-label invasion in food industries”, *American Journal of Agricultural Economics*). Other studies, however, point to the opposite result (Sckokai, P. and Soregaroli, C. (2008), “Impact of private label development across retail formats: Evidences from the Italian dairy market”, *Review of Agricultural and Environmental Studies*, vol. 87; Chintagunta, P. K., A. Bonfrer and I. Song (2002). “Investigating the effects of store brand introduction on retailer demand and pricing behavior”, *Management Science*, 48). Analyses of the impact also differ depending on the product categories (Bergès-Sennou F., Bontemps P and Réquillart V. (2004), “Economics of Private Labels: A Survey of Literature”, *Journal of Agricultural & Food Industrial Organization*, Vol 2, art 3.). The final effects on prices seem to depend on variables such as the possibility of differentiating the product and on customer loyalty.

2.4.4.3. Medium-term reduction of interbrand competition as certain manufacturers are driven out of the market

Private labels bring in a set of factors in which retailers have comparative advantage and which thus favour their circulation to the detriment of the manufacturer brands. These factors include the better information retailers possess on consumer habits and preferences, more efficiency in promoting their products, the capacity to pressure the ROB suppliers to efficiently produce quality goods and their capacity to use their reputation as a quality certification mechanism in situations where there is asymmetric information between sellers and end consumers.⁷⁵ What is more, given that retailers do not have to foot the large marketing costs that MBs do, the importance of entry barriers in the industry are mitigated.

Given all these factors, introducing a private label may favour competition in the manufacturing industry and increase consumer welfare. The flip side of these benefits is the risk that manufacturers whose brands are displaced by private labels may be driven out of the market.

The manufacturer brands that disappear are usually second or third level ones or weaker,⁷⁶ due, in particular, to the fact that the greater recognition by end consumers of the brand leaders make these more difficult to replace, so ROB tend, at least at the beginning, to compete more with the second and third level MBs than with the manufacturer brand leaders.

Introducing a private label in a category will initially widen the consumer's choices, but over time the ROB will end up displacing the slower moving brands,⁷⁷ because, amongst other reasons, the greater margins in ROB goods provide retailers with an incentive to delist the second or third level MBs. Taking into account that shelf space is limited, the result may be market foreclosure for certain manufacturers and a restriction of interbrand competition, apart from a reduction in product variety and quality.⁷⁸

The replacement in the medium and long term of the second and third tier MBs by ROB may push concentration in the manufacturing industry, thus weakening interbrand competition. But this competition can also be undermined by the different way in which retailer labels compete with manufacturer brands, because the competition between the leading MB and each retailer's

⁷⁵ Concretely, in fresh produce markets (where there are fewer brands recognisable to the consumer), ROB provide a certain quality certification given that the retailer would have no incentive for endangering its reputation by putting its name on poor quality products. See: European Commission (2009), "Competition in the food supply chain", accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — *A better functioning food supply chain in Europe*, Brussels.

⁷⁶ OECD (1998), *Buying Power of Multiproduct Retailers*, Policy Roundtables Document. See also the CNC resolution C-0353/11 EBRO/SOS (Active), paragraphs 131 to 134.

⁷⁷ Ezrachi A. (2010), "Unchallenged Market Power? The Tale of Supermarkets, Private labels and Competition Law", *The University of Oxford Centre for Competition Law and Policy Working Paper CCLP (L) 27*.

⁷⁸ European Commission (2009), "Competition in the food supply chain", accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — *A better functioning food supply chain in Europe*, Brussels.

own brand is normally less intense than the competition between the manufacturer brand leader and other manufacturer brands: not only is the ROB a more distant competitor for the MB leader than those other MBs, but the ROB is also present only in the stores of one retailer, whereas the MB may be present in all establishments, as well as in other sales channels such as horeca.

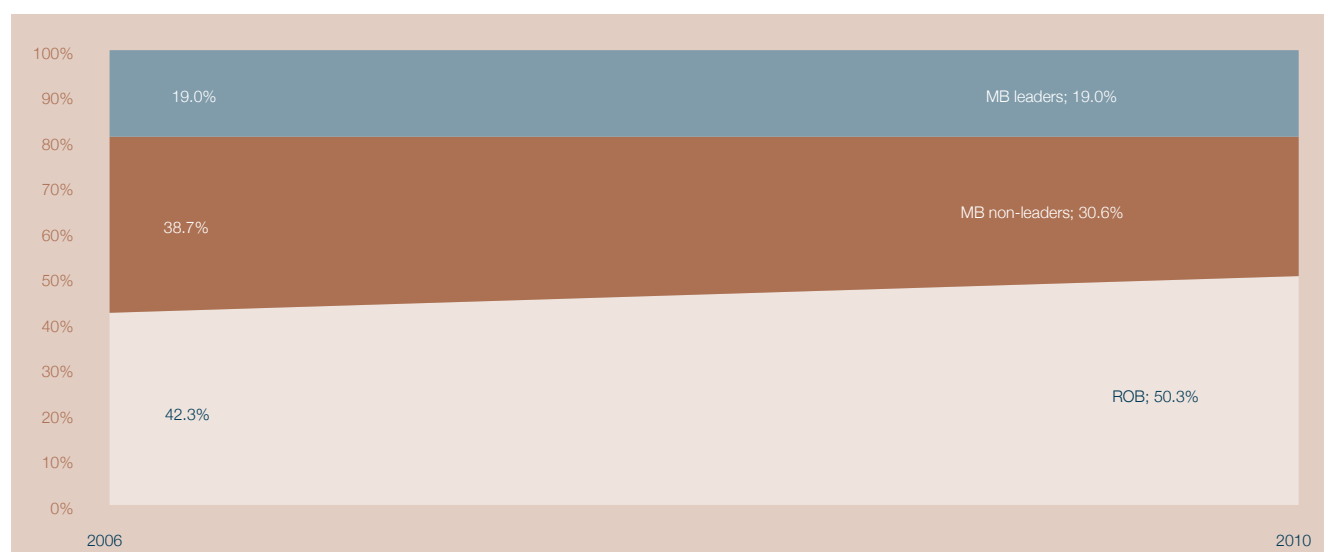
In addition, the polarisation of the market between a few MBs and the private label of each retailer fosters coordination, be it explicit or tacit, between brands and between retailers. Each retailer may choose to have its private label follow the price marked by the manufacturer brand, with an overall effect similar to that of a “hub&spoke” cartel.⁷⁹

In Spain, the available evidence appears to bear out that retailer private labels have grown at the cost of second and third tier brands. In fact, based on the data obtained from the surveyed retailers on the eight selected product categories, it can be observed that from 2006 to 2010 the share of the secondary MBs decreased eight percentage points, while ROBs were expanding their presence by approximately eight points and the rest of the main MBs held fairly stable. This trend is particularly acute in certain product categories, such as mineral waters, cereal and rice.

⁷⁹ In hub and spoke cartels, one operator (the hub) takes care of compiling and conveying information (and giving instructions, if applicable) to the rest of the operators (spokes), who would thus be interconnected indirectly through the hub. See, inter alia, CNC resolution C-0353/11 EBRO/SOS (Active), paragraphs 128 to 131.

Figure 14

Market shares in revenue terms, by MB leaders, MB non-leaders and ROB. 2006 and 2010



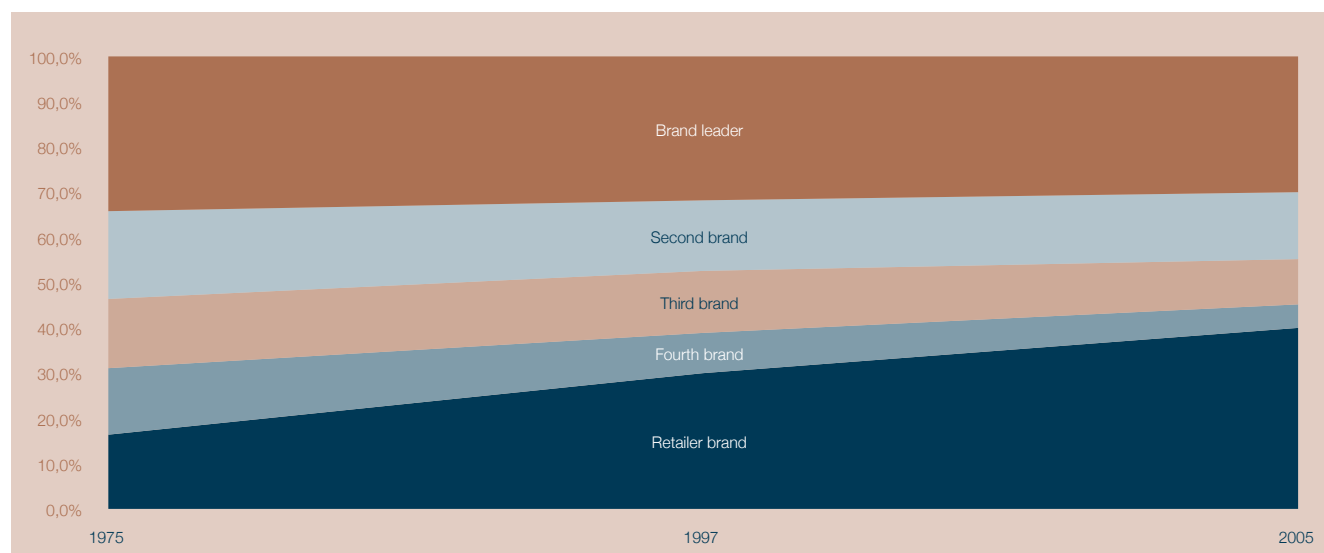
Notes: a) information obtained from retailer data in eight product categories; MB leaders refers to the revenue of the three main MB suppliers in each category, ROB is the revenue of private labels in the category, MB non-leaders is the revenue of the rest of the brands in the category; b) given that the data only refer to eight specific categories of goods, the ROB share differs from the aggregate market share mentioned in previous parts of this Report.

Source: Prepared in house using data obtained from retailers.

This evolution is in line with the longer term trend observed in other countries (Figure 15).

Figure 15

Evolution of market shares of top four manufacturer brands and private labels in the United Kingdom. 1975, 1997 y 2005



Note: * Estimated

Source: Ronald (2005): Private labels and branded goods: As manageable as teenage children, presentation made at the Oxford Symposium on Private Labels.

2.4.4.4. Long-term reduction of intrabrand competition due to attainment of significant advantages by large retailers versus other retailers

Over the long run, the advantages wrested by the major retailers from their bargaining power may reduce intrabrand competition and harm consumers.

Indeed, the discounts obtained by the main retailers allows them to reduce their prices downstream, putting pressure on the margins of their competitor retailers who cannot obtain such discounts, eventually to the point of forcing them out of the market.⁸⁰ With those competitors driven out of the market, the large retailers may then have greater capacity to increase the end prices in the long term, especially in markets with significant entry barriers that hinder the emergence of new operators who could have otherwise entered the market attracted by this means of exercising market power.

If, conversely, the retailers who have less buying power remain in the market, they may see the cost of obtaining their supplies go up if their suppliers find themselves forced to recoup from them the margin lost on the discounts granted to the big retailers (this is sometimes referred to as the “waterbed effect”). The capacity of a supplier to adopt this strategy of greater prices for the weaker retailers will mainly depend on its bargaining power vis-à-vis those buyers. That power can be reinforced in two ways:⁸¹ a weakening of upstream competition, as a result, for example, of the demands of large retailers driving suppliers to pull out of the market or to merge with each other; and a weakening of the competitive position of the weaker downstream distributors, due to their difficulties in matching the retail price cuts that the large retailers can afford thanks to the privileged treatment wrested from their suppliers.

The increase in supply costs imposed by suppliers on certain retailers may reduce intrabrand competition,⁸² to the extent that it restricts the competitiveness of those retailers, either because they are forced to pass those higher costs through to the prices they charge to the consumer, with the attendant risk of losing customers, or because they do not pass on those cost increases, in which case they may end up having to leave the market. Both scenarios will strengthen the market power of the major retailers and reduce intrabrand competition. What is more, taking into account that the market shares of the retailers with less buyer power decrease as a result of their weakened competitive position versus the retailers who obtain discounts, this dynamic can generate a vicious circle in which continuous growth in the market power of the large retailers harms the total welfare.

In theory, the only means of keeping the “waterbed” effect from harming consumers is if the discounts obtained by the big retailers and their improved competitive advantage in the market lead other retailers to boost their

⁸⁰ OECD (2008), *Monopsony and Buyer Power*, Policy Roundtables Document; Inderst, R. and Mazzarotto, N. (2007), “Buyer power in distribution”, chapter for the *ABA Antitrust Section Handbook: Issues in competition law and policy*.

⁸¹ Inderst, R. and Mazzarotto, N. (2007), “Buyer power in distribution”, chapter for the *ABA Antitrust Section Handbook: Issues in competition law and policy*.

⁸² OECD (2008), *Monopsony and Buyer Power*, Policy Roundtables Document.

efficiency and cut their costs in order to continue being able to compete on price with the majors.

Furthermore, the same as in the reduction of interbrand competition analysed earlier, a reduction of intrabrand competition can facilitate coordination between competitors at the retail level, by making it more likely for retailers to establish direct or indirect contacts with each other through the leading manufacturer or manufacturers.

2.4.4.5. Long-term reduction of manufacturer incentives and capacity to invest and innovate

The greater buyer power of retailers may reduce the incentives that their suppliers have to invest and innovate if the latter anticipate that they will not be able to capture an adequate portion of the combined profits. The argument is a variant of the “hold up” problem.⁸³ A supplier who anticipates that a retailer will exert its bargaining power to obtain a larger portion of the aggregate profits generated by their commercial relationship, to the point that the investment is no longer profitable, is likely to reduce its capital expenditure below the optimum level, with the consequent risk for the industry as a whole of underinvestment in capacity and innovation.

In turn, by pinching the manufacturer’s margins, the retailer’s greater buyer power may have a negative effect on its capacity to invest and innovate.

Nevertheless, the economic literature is not conclusive in this respect, and there are those who argue that the bargaining power can impact investment and innovation positively:

- Suppliers confronted by retailers with buyer power may have more incentives to innovate and invest if they believe that is the right strategy in order to improve their position in the market and to bolster their bargaining power.⁸⁴ In particular, by cutting its costs and making its product more attractive, a supplier has more possibilities for channelling its products through other retailers and for threatening a retailer with only supplying its rivals.

In turn, it should be noted that if a retailer’s buyer power increases due to a greater presence of its private label, the producers of the brand leaders may have more incentives to innovate, with the aim of achieving greater differentiation of their products to improve their negotiating position versus the retailer.⁸⁵ In fact, in the consultations conducted by the CNC, some suppliers said their response to retailer development of private labels was to intensify their innovation.

⁸³ In certain situations, there are specific assets that only have value in the context of a particular transaction between two parties. In these cases, the party that has invested in the asset may face a loss if the other party to the deal, who has not participated in the investment, pulls out of the transaction. Unless the contracts are perfect, the existence of specific investments of this kind leave the investor vulnerable to opportunistic behaviour by the other party once the outlay has been made. In these situations there is a “hold up” problem that leads to transactions that could be efficient for both sides eventually not being carried out.

⁸⁴ OECD (2008), *Monopsony and Buyer Power*, Policy Roundtables Document.

⁸⁵ Inderst, R. and Mazzarotto, N. (2007), “Buyer power in distribution”, chapter for the *ABA Antitrust Section Handbook: Issues in competition law and policy*.

What is more, as opposed to a context in which innovation, marketing and promotion were areas dominated by the manufacturers, the presence of major retailers with private labels can contribute to intensifying vertical competition in areas such as innovation or marketing.

- The vertical restrictions arising from the exercise of bargaining power by retailers may, in certain circumstances, generate efficiency, promote product quality, standardise processes, intensify economies of scale and augment the rationality and the efficiency of the food supply chain, all of which can work to enlarge the capacity for investment and innovation.⁸⁶

Nevertheless, inasmuch as the increase in retailer buyer power contributes to lessening the manufacturers' incentives to innovate, then product variety and quality would diminish, with the consequent harm to consumers.⁸⁷

The evidence available thus far does not offer conclusive results regarding the impact of increased retailer buyer power on innovation in Spain, although some indicators do point to the possible risk of negative impact in the medium and long term.

According to the Business Technological Innovation Survey conducted by Spain's Institute of Statistics, the INE, the number of innovating firms in the food industry as whole recorded steady growth from 2003 to 2009, nearly doubling in that period (Table 16). The relative weight of these companies in this industry has increased, as has the intensity of innovation and the percentage of revenues generated by new and improved products.

⁸⁶ European Commission, DG Enterprise and Industry (2011), *The impact of private labels on the competitiveness of the European food supply chain*, study prepared for the Directorate General for Enterprise and Industry by LEI, a research centre at Wageningen University.

⁸⁷ European Commission (2009), "Competition in the food supply chain", accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — *A better functioning food supply chain in Europe*, Brussels. FTC (2001), *Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry*.

Table 16

Business innovation indicators in Spanish food industry companies and in the economy as a whole. 2003-2009

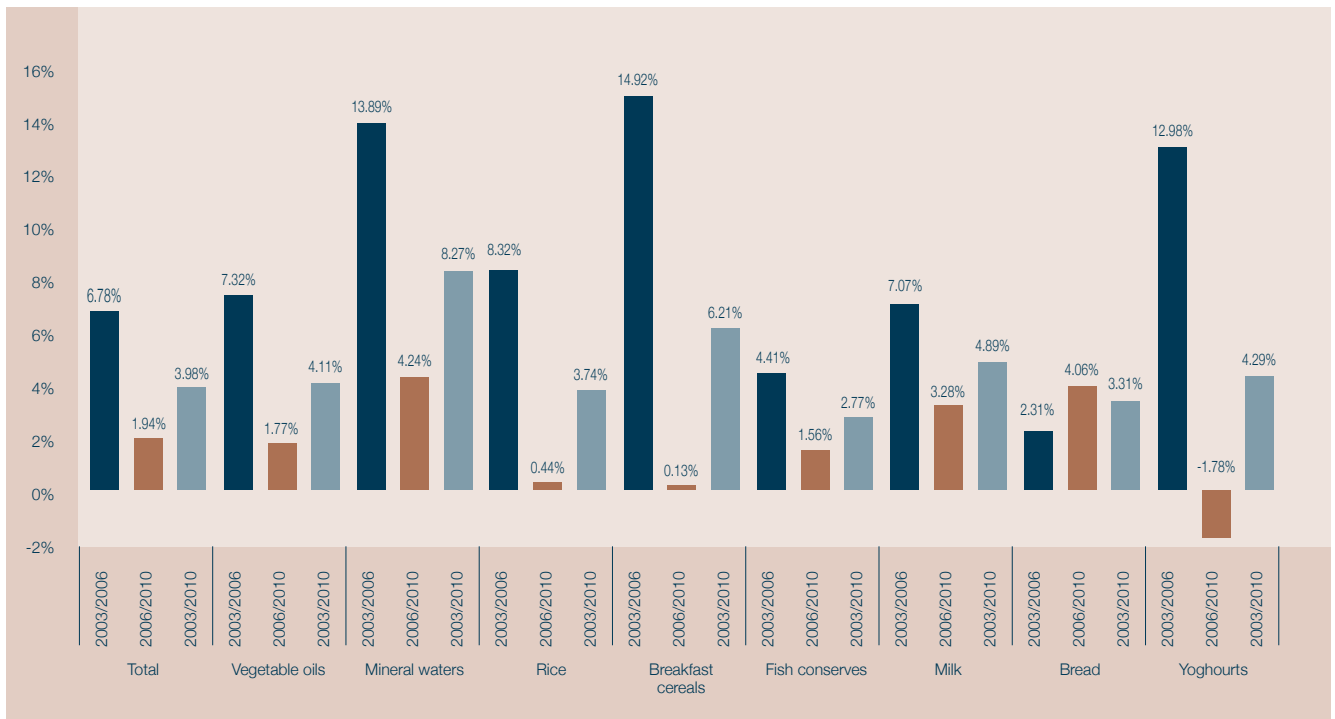
Food, beverages and tobacco	2003	2005	2007	2009
Innovative companies: Total	1,263	2,233	2,122	2,185
Innovative companies: %	21.5%	34.0%	32.4%	31.7%
Intensity of innovation	0.6%	0.7%	0.8%	0.9%
% of turnover in new and improved products	6.2%	12.1%	11.7%	13.6%
Economy as a whole	2003	2005	2007	2009
Innovative companies: Total	31,711	47,529	46,877	39,043
Innovative companies: %	19.4%	27.0%	23.5%	20.5%
Intensity of innovation	0.9%	0.8%	0.9%	1.1%
% of turnover in new and improved products	7.9%	15.6%	13.5%	14.9%
Note: The intensity of innovation measures spending on innovation activities as a percentage of revenues.				
Source: INE. Survey of technological innovation in businesses.				

Although the intensity of innovation and percentage of turnover accounted for by new products is lower in the grocery industry than in the economy as a whole, the relative weight of innovative firms is greater, and the rate of growth is also higher in the food industry. Lastly, it is worth emphasising that the economic recession may not have had as much impact on the pace of innovation in the food sector as in the overall economy, judging from the change in the percentage of innovative firms between 2007 and 2009.

That higher pace of investment, however, does not seem to have been accompanied by similar growth in the introduction of new products, which has slowed during the economic crisis, which may end up curbing innovation in the future. The data on introduction of new products from 2003 to 2010 in the eight product categories analysed in this Report indicate that the pace slowed during the last four years of that period (Figure 16), and more markedly in manufacturer brands (Figure 17) than in retailer private labels (Figure 18).

Figure 16

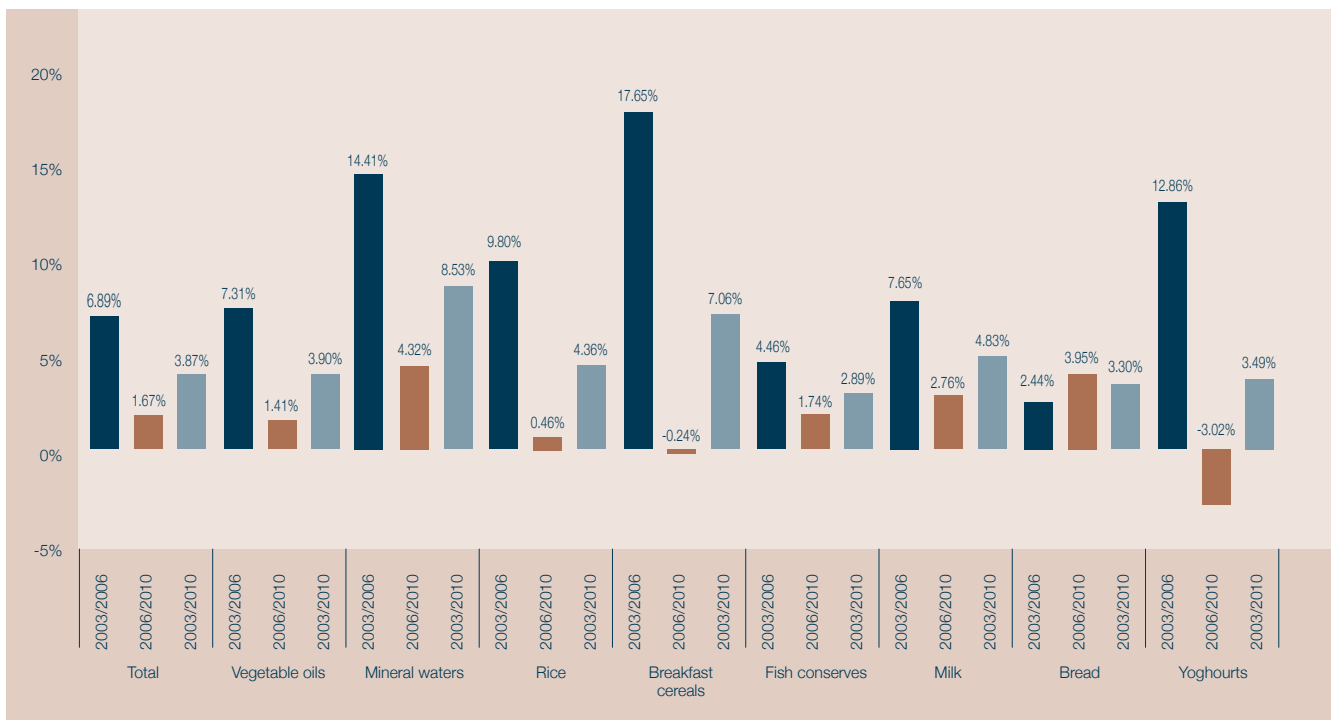
Average annual rate of introduction of new products (total brands), 2003-2010



Source: Prepared in house using data obtained from retailers.

Figure 17

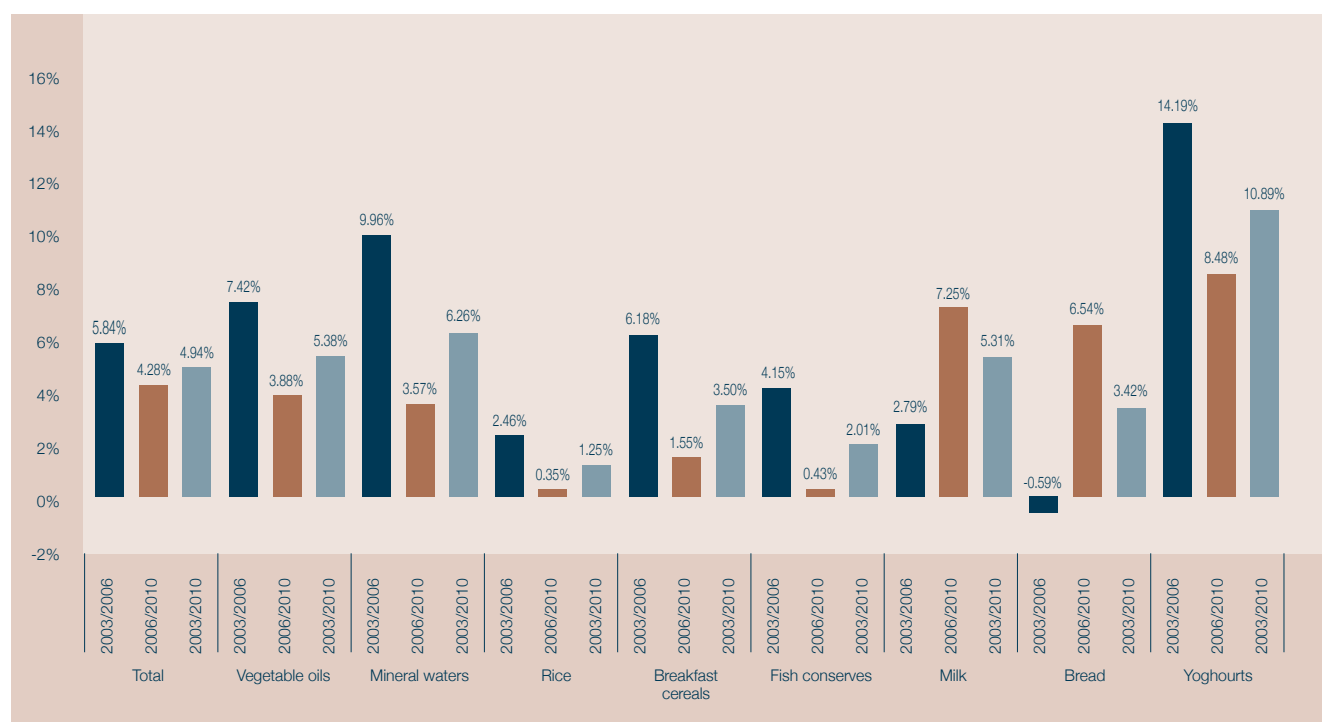
Average annual rate of introduction of new products (MBs), 2003-2010



Source : Prepared in house using data obtained from retailers.

Figure 18

Average annual rate of introduction of new products (ROBs), 2003-2010



Source : Prepared in house using data obtained from retailers.

These data contrast with the conclusions offered in a recent report commissioned to LEI by the European Commission's Directorate General for Enterprise and Industry,⁸⁸ which hold that, from 2005 to 2009, the number of new products introduced in Spain declined, mainly due to the fast growth in the ROB share and the smaller number of products offered in certain types of supermarkets. The conclusion is based on the downward trend in the introduction of new products in the following categories: fruit, potatoes and vegetables; juices; dairy products; and bread and other bakery goods. The factors driving this trend are narrow margins in the industry, the reduction in the number of stock keeping units by large retail chains, and a concentration of innovations in the design and packaging, more than in the creation of new products.

The LEI study emphasises that Spain constitutes an exception amongst European countries, as it is the only country where there exists a risk of a curb on innovation, even though the diverse factors that determine the pace of innovation in the grocery industry, such as the impact of the economic crisis, concentration in the retailing sector and the introduction of ROBs, are common to all of the countries. This atypical behaviour in the case of Spain may largely be the result of an important differential factor in the performance of the Spanish retail grocery sector, namely, the difference in the predominant format produced by the intense growth of supermarkets (medium and large) to the detriment of hypermarkets since the late 1990s.

88 LEI is a research centre in Wageningen University.

This differential factor, to which we will return in section 4 of this Report, may explain the slower introduction of new products in Spain than in other European countries, because, as opposed to the hypermarket, the smaller shelf space available in supermarkets only allows a more limited variety of goods and, hence, a smaller number of products. This drives up the manufacturer's cost of placing new products on store shelves and means they bear a greater risk when rolling out new products than if they were to be distributed mainly through hypermarkets. Moreover, as already mentioned above, the supermarket format is relatively more favourable to the presence of retailer private labels than the hypermarket, which may help explain the burgeoning growth achieved by private labels in Spain compared with other European countries.

In summary, although for the time being the indicators are not conclusive, there are reasons to surmise the existence of medium to long-term risks that the current Spanish retailing model may reduce innovation in the grocery industry.

3.

Commercial practices in retailing



3.1.

Context

During recent years, the developed world in general has seen a shift of bargaining power within the relations between grocery retailers and their suppliers from suppliers to retailers.

In this context, a common trait has been to see the greater retailer bargaining power exercised not just in the form of pressure for suppliers to maintain or lower the prices they charge to retailers, but also in the use of certain non-pricing commercial practices which are common to all countries in the EU and which have been studied by diverse competition authorities, including those in the United Kingdom,⁸⁹ Australia⁹⁰ and Portugal,⁹¹ and recently by the European Commission as well.⁹²

Since they are applied generally and simultaneously by all retailers, these practices may entail risks for competition, in addition to introducing inefficiencies in the medium term. Many of these practices alter not just the distribution of commercial margins between supplier and retailer, as would be the case if retailers exerted their bargaining power only to obtain lower purchase prices from their suppliers, but also the distribution of risks, which tend to be shifted onto the manufacturers, a development which may reduce their incentives to invest and innovate beyond what would occur if only their commercial margins were reduced.

As for the effects on competition, as will be detailed further below, some of these practices may close markets off for other manufacturers and, in general, will have a proportionately greater effect on the smaller manufacturers, with the consequent distortion of competition between manufacturers, and thus favouring the survival of only the leading brands.

And there are practices that may tend to close markets off to other retailers, acting as a type of barrier to entry that favours consolidation of the most powerful retailers and thus reinforces the pursuit and impact of those practices.

89 Competition Commission (2008), *The supply of groceries in the UK market investigation*.

90 Australian Competition and Consumer Commission (2008), *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*.

91 Autoridade da Concorrência (2010), *Relatório Final sobre Relações Comerciais entre a Distribuição Alimentar e os seus Fornecedores*.

92 European Commission, DG Enterprise and Industry (2011), *The impact of private labels on the competitiveness of the European food supply chain*, study prepared for the Directorate General for Enterprise and Industry by LEI, a research centre at Wageningen University.

3.2.

Analysis of commercial practices not based on prices

In order to analyse the implications for the Spanish manufacturing industry of a series of practices identified in other studies and countries⁹³ that may entail risks for competition, a survey was conducted of a total of 47 national manufacturers and 10 retail distributors. With respect to the manufacturers, a variable sample was selected of from four to eight of the leading suppliers in each of the following eight product categories: vegetable oils, waters, rice, breakfast cereals, fish conserves, milk, bakery goods and yoghourts. The selected sample of categories allowed diverse situations to be considered as regards: level of penetration of retailer brands, pace of innovation, existence of “hidden giants”, major national producers and regional impact.

The group of suppliers chosen also takes in very diverse situations with respect to degree of specialisation in manufacturer brands, retailer private labels or mixed brands, size (top suppliers and non-leaders in the category), and suppliers of product categories that are more or less suitable for serving as a “hook” for retailers.

As for the selection of retailers, in addition to including the biggest in Spain, the survey was also directed to those who represent specific characteristics considered salient for the analysis, such as type of format (“discount” retailers) and to retailers with a strong regional base.⁹⁴

Manufacturers were asked whether their retailers had applied to them the commercial practices set out in the accompanying table. And the retailers were asked if their suppliers had objected to the impact of those same practices in their relations.

93 Competition Commission (2008), *The supply of groceries in the UK market investigation*; European Commission (2009), “Competition in the food supply chain”; OFT (2010), *Groceries Supply Code of Practice*; Autoridade da Concorrência (2011), *Relações Comerciais entre a Grande Distribuição Agro-Alimentar e os seus Fornecedores*; Cruz Roche, I. (1999), “El proceso de negociación en el canal de distribución” (The negotiating process in the retail channel), in *Los canales de distribución de productos de gran consumo. Concentración y competencia*. Ediciones Pirámide; Basque Competition Court (2009), *La distribución de bienes de consumo diario: Competencia, oligopolio y colusión tácita* (Retailing of daily consumer goods: Competition, oligopoly and tacit collusion); European Commission, DG Enterprise and Industry (2011), *The Impact of Private Labels on the Competitiveness of the European Food Supply Chain*.

94 The sample includes Alcampo, Alimerka, Carrefour, Dinosol, El Árbol, El Corte Inglés, Eroski, Gadisa, Lidl and Mercadona.

Table 17

Commercial practices between retailers and manufacturers

A	With respect to contract terms and conditions
A.1	Contract terms and conditions which are not set down in advance in written form.
A.2	Retroactive modification of agreed contract terms and conditions (for example, in relation to payments or overall discounts).
A.3	Breach of contract terms without adequate compensation. Specifically, lengthening of the agreed time frames.
A.4	Threatening with dropping products in order to put pressure and impose conditions which are not included in the contracts.
A.5	Acquisition of supplies through blind online auctions.
B	With respect to payments
B.1	Payments for carrying products and for placement of products (listing fees, slotting allowances, including payments for premium shelf space or replacement on shelves and gondola headers, etc.).
B.2	Contributions to ancillary activities carried on by retailer (marketing payments for retailer visits, requirement to provide majority financing of promotional campaigns ("2 for 1") of the retailer, etc.).
B.3	"Atypical" payments which the manufacturers consider the retailer's responsibility (payments for erroneous or unfulfilled projections of sales or profits, requirement to buy back unsold goods, payments such as the so-called "wedding gifts", etc.)
C	With respect to conducts that affect third parties
C.1	Imposing purchase of goods or services offered by another party (for example, shipping, packaging, etc.), specifically, if the retailer receives compensation for this.
C.2	Influence of retailer over supplier for the latter to refrain from supplying third parties (exclusivity arrangements) or to increase prices to other retailers.
C.3	Obligation to transfer information on supplies or on prices charged to other retailers.
C.4	Establishing "most favoured customer" clauses in the contracts (these provisions oblige the manufacturer to match the commercial conditions given to any other customer who may receive better treatment than the customer party to the contract).
D	With respect to relations between manufacturer brands (MBs) and retailer own brands (ROBs).
D.1	"Unjustified" demands for confidential information from suppliers and use of that information (product rollout plans, R&D, promotional campaigns) for the benefit of the retailer's brand.
D.2	Tie-in between the commercial relation with the manufacturer's brand and an obligation to also produce the retailer brands.
D.3	Use or imitation of the supplier's image for the benefit of the retailer's brand.
D.4	Using manufacturer brands or retailer private labels as loss leaders (to use them as "hooks" or "magnets").
D.5	Discriminatory management of the category by the retailer (delisting a supplier and replacing it with a ROB; strategic shelf placement of goods to benefit the ROB, using of the pricing and/or promotion policy to the detriment of the manufacturer's brands, etc.).

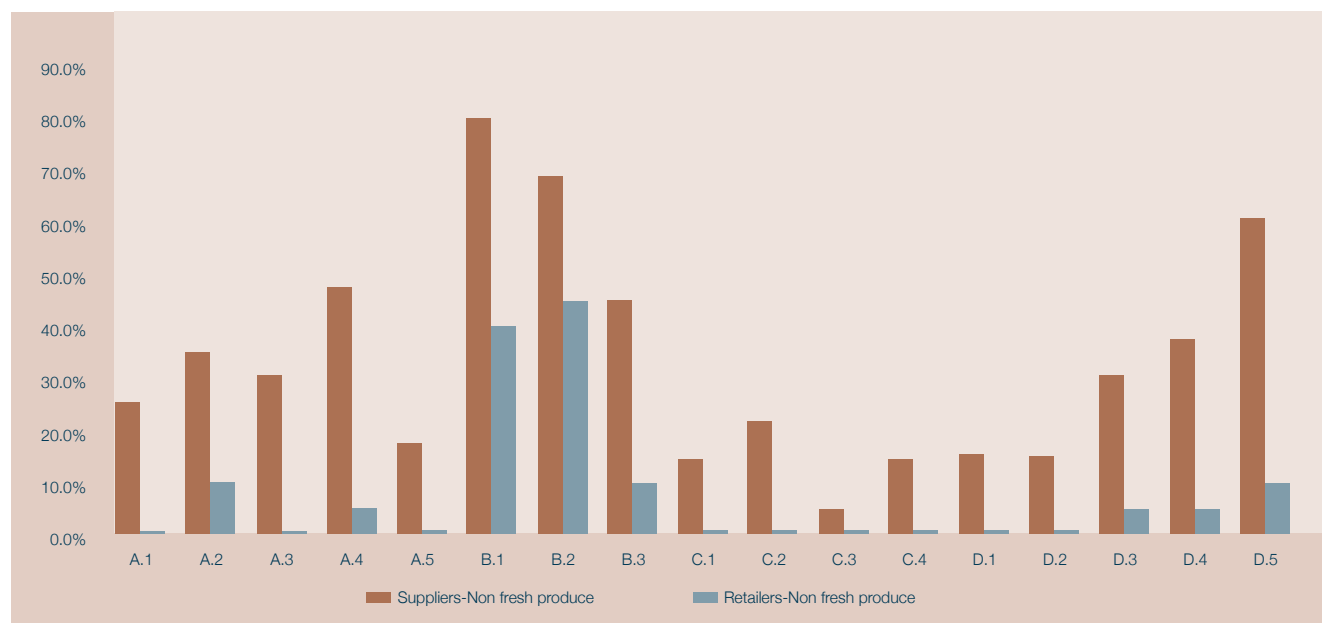
Source: Prepared in house using data obtained from the manufacturing industry.

As shown by Figure 19 the first conclusion which can be drawn from the analysis of the answers to the survey is that retailers do not seem very aware of the possible negative impact of those practices. They often say they have received no complaints from their suppliers with respect to many of them, whereas the immense majority of the suppliers have confirmed the existence of these practices, at least sporadically, and emphasised their many negative consequences, without prejudice to the nuances discussed further below. This divergence between suppliers and retailers may reflect the hesitation of manufacturers to complain to their retailers about these practices because they fear possible reprisals or because they have doubts that the objections would move retailers to modify their conduct.

In Figure 19, the height of the bar columns shows the level of a synthetic indicator of the frequency of the practice in question. This indicator is built from the replies obtained from suppliers and retailers: a value of 100% means that all the operators (suppliers or retailers, as the case may have it) have said the practice is frequent; on the opposite, a value of 0% indicates that for that group of operators the practice never occurs. The replies received from suppliers, shown in green, refer to the existence of the practice in the specific categories of products that they supply to retailers, whereas the replies of the retailers, in blue, refer to their behaviour in relation to all non-fresh food products.⁹⁵ As may be observed, for all the practices identified, manufacturers stated a much higher incidence than retailers.

Figure 19

Comparison of the incidence of the practices between suppliers and retailers (frequency indicator for the practices listed in Table 17)



Source: Prepared in-house based on replies received

⁹⁵ The retailers were asked to respond for fresh produce and for non-fresh food products. Their replies did not differ significantly between those two classes of products.

The practices have been classified into four groups. The first, practices A.1 to A.4 refer to contract terms and conditions, and cover the degree of formalisation of contracts and the degree of respect for the conditions signed at the beginning of the commercial relation throughout its duration, whereas practice A.5 refers to blind auctions, a specific form of procuring supplies.

The second group covers practices regarding payments by suppliers to retailers. Practice B.1 refers to the so called access payments (access to the retailer or to store shelves), while practices B.2 and B.3 touch on payments subject to actions decided more or less unilaterally by the retailer on a more or less sporadic basis.

Group three includes practices used by the retailer to condition the supplier's dealings with other operators, either obliging the supplier to purchase goods or auxiliary services from third parties (C.1) or placing restrictions on the supplier's sales to other retailers (C.2 to C.4).

And the last group (practices D.1 to D.5) refers to practices that directly affect the relations between the manufacturer's brand and the retailer's brand and, more generally, product category management.


The analysis of the replies received from the suppliers indicates that the **most common practices in the retail distribution chain are commercial payments**, specifically, payments for carrying and placing products (over 70% of the suppliers said these payments are frequent, with more than 85% saying they take place at least occasionally) and contributions to ancillary activities (with nearly 60% of suppliers saying they are frequent and almost 80% that they occur at least occasionally).

Suppliers also regard **discriminatory management of categories** by retailers as a frequent practice (more than 70% affirmative response).

Other types of practices applied with high frequency are those that refer to **retroactive modification of contracts and the threat of delisting** as a means of imposing conditions not previously agreed. Some 56% of suppliers say that retroactive changes in the agreed contract terms and conditions occur frequently or occasionally. 35% state that the commercial conditions were not set down in advance in written form and 42% declare to have suffered a breakoff of the commercial conditions without an adequate compensation.

Around 23% of the manufacturers assert that they have been subjected on occasions to **most favoured customer clauses**, that is, they have been required to match the commercial conditions that they give to their customer with the most favourable treatment.

The survey also shows, on the other hand, that the **least frequent practices** (with approximately a 80% of negative replies) include demands to disclose to a retailer information on supplies and prices offered to other retailers, the retailer tying its listing of manufacturer brands to the manufacturer's commitment to also make private label goods for the retailer.



The most common practices in the retail distribution chain are commercial payments.

Analysing the **answers by product category or sector** shows that, in general, the commercial practices examined appear to be more frequent in those product categories whose characteristics tend to strengthen supplier dependence on the retailer and thus weaken the supplier's bargaining power vis-à-vis the retailer. This is the case of commodity goods, which have few possibilities for differentiation, and, in general, of products with relatively large ROB penetration levels. Specifically, it was concluded that:

- In those products commonly regarded as “hooks” or “magnets”, manufacturers believe that selling at a loss is a relatively common practice. In the case of milk, more than 40% think loss leaders are common, and this percentage rises to 70% in the case of vegetable oils manufacturers.
- Vegetable oils manufacturers are the most prone to say they are subjected to commercial practices such as not putting the agreed contract terms and conditions, or changes to those provisions, in writing (over 70% affirmative replies). Similarly, 57% say their retailers frequently procure stocks through blind auctions.
- Discriminatory category management appears to be a routine practice in the cereals and oil categories, according to the manufacturers (more than 70% affirmative and frequent replies).
- The use or imitation of the supplier's image in favour of the retailer's brand (the so-called “copycat” conducts) is apparently relatively frequent in mineral waters and canned fish (more than 50% affirmative replies from suppliers surveyed).

In addition, the responses to the survey indicate sharply different perceptions of the situation depending on whether the suppliers produce mainly manufacturer brands, retailer private labels or a mix of both.⁹⁶ The results indicate that retailers apply the practices discussed here more frequently to manufacturers with whom their commercial relation is not as close, that is, with whom they do not have stable agreements for production of ROB products. Specifically:

- The MB producers are the ones who, in general, claim they are subjected more frequently to all of these practices and, in particular, to those regarding the contract terms and conditions and commercial payments.
- Amongst the mixed suppliers, certain practices seem to have a greater incidence than amongst the MB suppliers; namely, tie-ins between the decision to carry a MB product and the obligation to produce a ROB, the supplier obligation to buy goods and services from a particular third party and payments for carrying and placement of a product.

⁹⁶ For these purposes, suppliers for whom more than 70% of their sales to the retail distribution channel is represented by sale of MBs are considered MB manufacturers; ROB suppliers are those whose ROB sales are more than 70% of their overall sales to the retail distribution channel, and the segment mixed suppliers includes all of the rest (ROB sales of between 30% and 70%).

- ROB producers responded negatively in very significant percentages in relation to a large part of the practices.

Lastly, with respect to the market leaders, the results confirm that they are the ones most often targeted by copycat packaging. In addition, this group of manufacturers reply more frequently than the producers of secondary brands that they are subjected to certain commercial payments, for example, gondola header and promotional payments. Specifically:

- All the brand leader manufacturers surveyed answered that they have been required to make commercial payments (for carrying and placing goods and for contributions to ancillary activities).
- Nearly 80% said that the retailer's brand had used or imitated their image, compared with only 32% of the non-leaders. Also, some 44% of the leaders, versus 24% of the non-leaders, claim that they have been asked for confidential information to be used for the benefit of the ROB.
- The brand leader manufacturers, more frequently than the non-leaders, say they have received threats to drop their products,⁹⁷ and have been required to accept most favoured customer clauses in their commercial relations with the retailers.

⁹⁷ This fact could reflect differences in the negotiations between retailers and their MB suppliers: whereas with the leading suppliers the retailers negotiate the general supply conditions, and in those negotiations they can resort to the threat to drop that supplier's products, with the smaller MB suppliers they do not negotiate the various clauses of the contract, but instead offer them standard terms and conditions.

3.3.

Competition risks posed by each of the practices identified

3.3.1. Commercial payments

3.3.1.1. General characterisation

Commercial payments are fees that suppliers pay to retailers in respect of a variety of items within the framework of a vertical relationship. They include:

- a) Listing fees and slotting allowances.
 - Listing fees. Through this payment the retailer charges the manufacturer an upfront fee at the start of the trade relationship for access to its retail network and shelf space.
 - Payments for use, premium space or replacement on store shelves and gondola headers. These payments are made by the supplier in order to have its products placed in a particular location in the retailer's premises.
- b) Contributions to ancillary activities carried on by the retailer.
 - Payments associated with general commercial actions carried on by the retailer; for example: marketing payments (market research, product presentation, etc.), retailer visits to manufacturer sites for product quality control, etc.
 - Payments for promotional activities carried on by the retailer for the product. These payments are tied to commercial initiatives specific to the supplier's product, such as "2 for 1" type promotional campaigns or promotional brochures.
 - Payments for managing product categories (management of pricing, advertising, positioning of a given product category, waste disposal, etc.) by the retailer or another party.
- c) Other types of commercial payments.
 - Payments used by the supplier to compensate the retailer for the consequences of erroneous or failed projections of sales or profits, including the requirement for the supplier to buy back unsold goods.
 - Atypical payments such as the so-called "wedding gifts", which are demanded when the retailer merges with other operators, or payments required by the opening of new establishments or expansion of the retailer's network, etc.
 - Payments demanded of the supplier due to negligence, failures or breaches of supply committed by the retailer itself as the result, for example, of misuse or improper warehousing of the product, or of complaints by consumers not attributable to a product defect.

Commercial payments entail a transfer of earnings and risks between retailers and manufacturers, and their effects on how the market functions vary depending on the manner in which they are implemented (fixed or variable fees), the benefit received by the supplier for the payment (the consideration for the payment), their amount and their frequency. An assessment of those effects should also take into account a broad range of additional elements, such as the nature of the product, the structure of the market and how the supplier, the retailer and their respective rivals are positioned there, the presence or absence of entry barriers, the degree to which similar payments are customary in the sector, etc.

Nevertheless, in general, these payments may give rise to the following competition issues, above all if they are large and widespread:

- They can weaken **intradbrand competition**, because once a payment is made to a retailer, the supplier may not have sufficient margin for making the same payments to other retailers. Consequently, these payments limit the number of retailers to which each manufacturer can have access and give a significant advantage to the retailers who receive them over the rest (the “waterbed effect”). If the commercial payments are demanded by all retailers, the supplier may not be able to afford paying all of them and thus be obliged to cut down the number of retailers through which it can channel its sales. This will gradually reduce the competitiveness of the retailers who do not receive the payments with the potential to eventually drive some of them out of the market. These effects will be more likely where the initial intradbrand competition is weaker.
- They may also represent a barrier to entry for new manufacturers and thereby reduce **interbrand competition**. If the payments are large, they will only be profitable for the leading brands, which are the ones that have sufficient scale and product range, and this will tend to reinforce the leadership of the top brands to the second and third tier brands. These effects are more likely to take place in sectors where interbrand competition is weak.
- If the payments made by the supplier to the retailer are fixed, that is, their amount is independent of the quantity of goods sold, and the supplier prices those payments into the product price, the retailer will probably pass on the increase in the cost of its supplies to the retail customers, instead of, for example, keeping those retail prices stable or even lowering them in response to the greater revenues obtained via the payments. This is so because, if the payments are received regardless of the amount of product sold, the retailer does not have incentives to cut prices in order to sell more. In these circumstances, widespread application of fixed commercial payments by suppliers to retailers is not likely to give rise to reductions of the prices charged to consumers.

Nevertheless, commercial payments by suppliers to retailers may have positive effects as well:

- Slotting new products into a retailer’s establishment may require removing others, which entails certain fixed costs for the retailers, such as adapting the accounting or IT systems or retiring the stocks of other products to free space on store shelves. Payments for listing new products can help

distribute these fixed costs between supplier and retailer and therefore be efficient to the extent they encourage the retailer to introduce new products.

- Listing and slotting frees also distribute the risk of failure of the new product between the supplier and retailer, a crucial element to be taken into account if we were to judge by some of the estimates of that risk,⁹⁸ and contribute to solving information asymmetries between manufacturers and retailers. Frequently, retailers have less information than manufacturers on the prospects of new products and may therefore unduly delay the arrival of new products onto their shelves. In this sense, payment by the manufacturer of a fixed sum for listing and carrying its new product serves to “certify” the manufacturer’s confidence in its quality, which can help dispel the retailer’s doubts about the advisability of participating in the product’s rollout.
- Optimum allocation of shelf space is essential for retailers, given that shelf space is a scarce resource and there exist differences in terms of storage and display costs among categories. Slotting allowances that manufacturers are willing to make to place their goods on shelves help determine the optimum allocation of that scarce space, as it provides information similar to what would be obtained from auctioning off that space.⁹⁹
- Lastly, there is a vertical externality between supplier and retailer comparable to what is traditionally known as “creating clientele”. When the retailer’s sales increase, sales of its suppliers’ products also rise. For this reason, commercial expansion and promotion actions carried out by the retailer may be less than what its suppliers would like, given that the retailer does not reap all of the benefits of those actions. Supplier contributions to foot part of the bill for those promotional and marketing activities of the retailer can help contribute to solving this vertical externality.

3.3.1.2. Incidence of the practice in Spain

In Spain, according to the replies received from suppliers, commercial payments are a very widespread and routine practice in the sector.

Specifically, more than 85% of the surveyed suppliers indicated they pay product listing fees or slotting allowances frequently or occasionally. The payments relating to ancillary activities of the retailer and atypical items are very widespread (with 79% and 67% of surveyed suppliers answering affirmatively, respectively). The replies from retailers confirm that the most usual payments are for product placement (gondola headers, macro-displays, etc.). Table 18 shows the main results of the survey of suppliers in relation to these practices.

The information which has been obtained does not display significant differences with respect to the incidence or functioning of these payments between

98 Some sources indicate it may be as high as 70%. See Federal Trade Commission (2003), *Slotting allowances in the retail grocery industry*.

99 This fact is consistent with the empirical evidence found on the difference in payments according to categories. The categories of fresh produce and refrigerated products (with limited space and very high storage and display costs) have higher payments.

the manufacturer brand suppliers of the selected product categories, which appears to indicate that this type of payment is very widespread.

Table 18


Incidence of commercial payments in Spain according to the suppliers surveyed, by type of payment

		Yes, frequent	Yes, on occasion	No	Total
B.1	Payments for carrying products and for placement of products (listing fees, slotting allowances, including payments for premium shelf space or replacement on shelves and gondola headers, etc).	73%	12%	15%	100%
B.2	Contributions to ancillary activities carried on by retailer (marketing payments for retailer visits, requirement to provide majority financing of promotional campaigns ("2 for 1") of the retailer, etc.).	58%	21%	21%	100%
B.3	"Atypical" payments which the manufacturers consider the retailer's responsibility (payments for erroneous or unfulfilled projections of sales or profits, requirement to buy back unsold goods, payments such as the so-called "wedding gifts", etc.)	23%	44%	33%	100%

Source: Prepared in-house based on official requests for information sent to suppliers

No concrete estimates are available for the amounts of these payments. A large majority of the suppliers surveyed indicated that those sums cannot be disaggregated from the total payments made to the retailer for other considerations. The figures provided by some of them, however, indicate they may reach as high as 20-30% of the supplier's billings to its main distributor of the manufacturer brand, although there are important differences between retailers regarding their demand for such payments (several suppliers in different sectors named a specific retailer that does not charge slotting allowances) and by product category: in the case of milk, various suppliers say that their payments to their main retail distributor are far less than 10% of their sales to that retailer.

The bulk of commercial payments are for shelf placement and advertising and promotion; listing fees are small and, in fact, were practically non-existent in 2010. Payments for shelf placement are not homogeneous and include, depending on each case, placement on shelving or on gondola headers or next to the cash registers. Nor are the payments for advertising and promotion homogeneous, neither between suppliers nor between retailers, although they normally include a portion for general advertising and another for specific advertising of the product category in question (inclusion in promotional pamphlets, "buy 2, get 3" campaigns and similar initiatives). Together with these,



Commercial payments should be known or predictable at the start of the trading relationship or at each stage in that relation (normally annual) and, in all events, should be known beforehand.

there are other types of payment of greater or lesser frequency, such as for breakage of stocks, replenishment or opening of new establishments.

As regards their degree of formalisation, it is not uncommon to see the payments regulated in a contractual document with specific conditions, frequently classified as “off-invoice”. Also, although it is fairly customary for the payments to be set as a percentage of the sales to the retailer in a given time period (although for some payments, such as those for opening of new establishments, a fixed sum is set), it is quite common to see the documents formalising the payments dated after the commercial campaign in question: practically all of the occasions examined show that the specific conditions for the year 2010 were signed during the last month of 2010, or already in 2011. In one extreme case, commercial conditions for 2010 were signed as late as March 2011.

These data confirm the difficulty of knowing beforehand the actual terms of the commercial payments that has been denounced by a majority of the manufacturer brand suppliers. In particular, the suppliers indicate that (i) it is very hard to verify whether the actions (all of a promotional nature) for which they are charged by the retailer have actually been carried out or not, and that (ii) many of the payments are used at the retailers’ discretion as mere pretexts in negotiations for reducing their purchase prices.

This unpredictability of commercial payments has negative repercussions on any efficiency they may generate, above all taking into account that the amount of these payments means they can have notable influence on the supplier’s decisions. The supplier’s planning of these matters is hindered by the uncertainty as to the amount of these payments and as to the effectiveness of the service supposedly performed by the retailer in return.

In these circumstances, it is more likely that the effectiveness of these payments for reassigning risks and externalities optimally is impaired, and that they become a tool used by the retailer to finance its promotional activities and to reduce supply costs. As mentioned further above, the redistribution of margins between supplier and retailer associated with these payments may create inefficiencies to the extent that they provoke an inappropriate shift of commercial risks from the retailer to the supplier, as happens when no real service is received for the payments, when they are fixed or when their amount is determined after the fact.

3.3.1.3. Conclusions

In summary, neither the existence of commercial payments nor their magnitude are considered problematic, because they can favour the sector's efficiency: they allow the risks associated with bringing out new products to be distributed, and are an adequate mechanism for allocating a scarce good (shelf space) and for solving the vertical externalities between retailer and supplier associated with promotion and management expenses. The way these payments are determined, however, may indeed be harmful, because (a) very often they are determined after the fact and (b) the service received by suppliers for these payment is not clear. In these circumstances, the payments do not produce the positive effects discussed above and only involve a rearrangement of margins between supplier and retailer which, moreover, is not very efficient and does not benefit competition, as they may involve an excessive transfer of risks to the suppliers, it may be inflationary and it may have an exclusionary effect for the smaller retailers.

Consequently, we believe that commercial payments should be known or predictable at the start of the trading relationship or at each stage in that relation (normally annual) and, in all events, should be known beforehand. In addition, the retailer should commit to the suppliers as to how the actions for which these payments are made will be carried out. Also, the payments made by suppliers in respect of retailer actions with a duration longer than the commercial relationship between supplier and retailer should be returned at the end of the relation.

3.3.2. Category management and information exchanges

3.3.2.1. General Characterisation

Category management can be defined as the process by which the manufacturer and retailer manage the different categories as strategic business units with the objective of improving the results of the management and providing greater value to consumers.¹⁰⁰ For these purposes a category means the collection or *family* of products that satisfy a specific need of a particular group of consumers, and which the latter perceive as substitutable or complementary. Category management spans all activities carried on in this regard, including the policies on pricing and advertising, positioning, managing the assortment to be offered, etc., applied to a given product range.

This management may be entrusted by the retailer to a supplier ("category captain") by agreements for the supplier to manage an entire category of products that will normally include products from the supplier's competitors as well as its own. It may also be conducted by the retailer directly, after a period of consultation or collaboration with the suppliers, or be commissioned to an independent third party.

In most cases, category management agreements between retailers and manufacturers do not pose problems and allow the retailer to benefit from

¹⁰⁰ Huguet, C. (1997), "El category management o la ley del consumidor"(Category management or the law of the consumer), Harvard-Deusto, *Marketing & Ventas*, July-August.

the manufacturer's better knowledge of the demand and the market for its product. In particular, those arrangements:

- Make it easier for retailers to obtain the marketing knowhow that manufacturers have with respect to their product categories. In addition, insofar as they encourage efficient replenishment in the supply chain and ensure that store shelves carry the right amount of this product at all times, these agreements facilitate the exploitation of economies of scale.¹⁰¹
- Furthermore, the more detailed knowledge of consumer habits and of the evolution of their preferences that can be attained by retailers and manufacturers through these arrangements makes it easier to satisfy demand and can provide incentives for innovating to adapt to those preferences.

Nevertheless, these agreements may have negative effects on competition if they introduce discrimination between certain manufacturers and others. This can be the case where:

- The captain benefits from preferred access to store shelves by taking advantage of its closer relations with the retailer.
- The captain wields decision-making power, which can limit or harm the distribution of its competitors' products. Category management agreements can even give rise in this case to anti-competitive exclusion of competitors with major negative repercussions for interbrand competition.
- The captain has privileged access to information and data on its competitors that places it at an advantage over the rest of the manufacturers.

The possible negative effects on competition will depend on the decision making power of the captain, on the transparency of the management agreements and on the breadth of the category covered by the agreement.¹⁰²

Also, widespread use of category management agreements may relax competition between manufacturers and retailers and facilitate collusion between them, given that they tend to increase the transparency of the behaviour of operators.¹⁰³ Suppliers will be likely to have fewer incentives for carrying on aggressive commercial actions, such as lowering their prices to retailers or promotional campaigns for their products, if they anticipate that the category captain will learn of those strategies in advance and will be able to match them quickly or even try to block them: as has already been mentioned, the category captain may have the capacity to influence a retailer's decision on whether or not to accept certain commercial strategies of other suppliers, such as a special offer. Lastly, if there is a cartel of manufacturers, the captain

Widespread use of category management agreements may relax competition between manufacturers and retailers and facilitate collusion between them, given that they tend to increase the transparency of the behaviour of operators.

101 Oubiña, J. (2002), "ECR o respuesta eficiente al consumidor: El reaprovisionamiento eficiente en la cadena de suministros" (ECR or efficient consumer response: Efficient replenishment in the supply chain), *Distribución y Consumo*, N° 63, pgs. 69-85.

102 Autorité de la Concurrence (2010), *Avis n° 10-A-25 relatif aux contrats de «management catégoriel» entre les opérateurs de la grande distribution à dominante alimentaire et certains de leurs fournisseurs*.

103 Competition Commission (2008), *The supply of groceries in the UK market investigation*, page 150.

may more easily detect any deviations by cartel members. If there is a common captain for several retailers, it may make it easier for those retailers to follow or communicate with each other.

In all of these situations, the core problem is the exchange of information. The type of information exchanged, the frequency of the exchange and the nature of the product and of the pre-existing interbrand and intrabrand competition are the determinants for analysing the impact of this practice on competition. The exchange of information capable of reducing the competitive uncertainty of competitors may constitute an infringement of article 101 of the TFEU¹⁰⁴ and article 1 of the LDC in Spain.

These information flows can facilitate coordinated practices between retailers and manufacturers and generate the so-called “hub and spoke” cartels, in which one operator, the hub, takes care of compiling and conveying the information (and of giving instructions, if applicable) to the rest of the operators, the spokes, who would therefore be interconnected indirectly through the hub.

In the context of category management agreements, the hub would be the category captain or the suppliers who work on the management with the retailer, generally the manufacturer brand leaders, and the spokes would be the retailers.¹⁰⁵ Recently, other competition authorities, such as Germany's Bundeskartellamt¹⁰⁶ and the UK's OFT,¹⁰⁷ have sanctioned agreements of this kind. The CNC also recently referred to the problems raised by these arrangements.¹⁰⁸

Hub and spoke schemes need not be found across all products and may instead be confined to certain product categories, depending, for example, on the willingness of manufacturers to collaborate.

The competition problems associated with category management may even arise without a category captain. When the retailer sells goods with its own brand they may have incentives for managing categories in a discriminatory manner to benefit their own labels over the manufacturer brands. The specific practices that may be pursued by a supplier along these lines include:

- Refusal to list and carry a product or the delisting of the product of a supplier and, specifically, replacing its brand with the retailer's. This practice may particularly affect the second and third tier manufacturer brands, as these are normally the closest competitors for the retailer's private label.

¹⁰⁴ European Commission, *Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation arrangements* (2011/C 11/01).

¹⁰⁵ Competition effects may also arise from other hub and spoke schemes in which the hub is a retailer and the spokes are manufacturers. These arrangements may facilitate collusion between manufacturers who have greater opportunities to exchange sensitive information on future prices and promotional strategies through the retailers.

¹⁰⁶ *Multi-million fines imposed on manufacturers of consumer goods on account of exchange of anti-competitive information*, press release 17.03.2011.

¹⁰⁷ *OFT fines certain supermarkets and processors almost £50 million in dairy decision*, press release 10.08.2011.

¹⁰⁸ CNC resolution C-0353/11 EBRO/SOS (Active), paragraph 134.

- Imposing higher mark-ups (retail price less wholesale price) for products of the manufacturer's brand than for the retailer's brands.
- Refusal to accept a supplier's proposal to cut prices to promote a product, in order not to weaken the competitive price position of the retailer's brand, and, in general, declining to accept MB promotional actions, both "off-package" and "on-package", in order not to harm the ROB.
- Strategic placement of the products on store shelves to benefit the retailer's brand.

The main danger for competition from these conducts is the reduction of interbrand competition when the weaker MBs are driven out of the market,¹⁰⁹ which entails greater risks when competition between retailers is scarce.

Similarly, in the context of category management, interbrand and intrabrand competition may be weakened if retailers ask manufacturers for information on their relations with competitor retailers, in particular, if the information refers to the purchase prices paid by other retailers or to promotional policies. These flows of information between manufacturers and retailers can have a positive effect on the market to the extent that they contribute to lowering the prices of supplier sales to retailers and the reduction is passed onto consumers; but they also bring a risk of undermining competition between retailers, because they can facilitate mutual monitoring and even explicit coordination of their behaviours. In addition, these information exchanges allow retailers to monitor their suppliers, and thereby act as a disincentive for the aggressive commercial actions the latter may wish to pursue with other retailers. Ultimately, all of this may drive retailers who compete mainly on price out of the market.

3.3.2.2. Incidence of the practice in Spain

All of the retailers surveyed assert that they themselves manage the categories autonomously through their own staff, without relying on the services of any outside manager, whether manufacturer or other third party. The suppliers confirm that it is the retailers who handle category management and have the final decision on these matters.

¹⁰⁹ UK Competition Commission (2007), "Working paper on the competitive effects of own-label goods", prepared for the report *The supply of groceries in the UK market investigation*. Competition Commission (2008), *Own label goods, The supply of groceries in the UK market investigation, appendix 8.11*; European Commission (2009), "Competition in the food supply chain", accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — *A better functioning food supply chain in Europe*; Australian Competition and Consumer Commission (2008), *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*.

Some retailers say that on occasions they ask manufacturers, leaders or not, for guidance on managing certain specific categories. The manufacturers corroborate this assertion.¹¹⁰

The collaboration between manufacturers and retailers is carried on through agreements or contacts between staff of both sides and exchanges of information to undertake category improvement projects. That information may refer to diverse activities such as:

- Analysis/audit of sales. This analysis takes in both the manufacturer's sales and the total market sales for the category and the sales of the retailer itself.
- Recommendations of optimum assortment per segment.
- Recommendations on product placement and layout based on studies of consumer shopping habits and on data on the turnover of the goods.
- Recommendations for optimum signage of the categories in the outlet.
- Preparation and execution of planograms (graphic representation of the layout of the products in a specific area of an outlet).

Manufacturers state that category management does not involve decisions on pricing or mark-ups.

In relation to the exchange of information that takes place within the framework of this collaboration **between suppliers and retailers:**

- Retailers say that the information normally refers to market trends and customer preferences. Some indicate that they swap information on the evolution of their sales flows (sales of the manufacturer's products in the retailer's network, total sales of the retailer and total sales of the product category to which the manufacturer belongs), consumer behaviour, implementation alternatives of the supplier, evolution of the category, the overall results of the manufacturer, etc. Other retailers claim that the only data shared are publicly sourced (Nielsen, for example) and that they provide no information to the manufacturers. According to them, the exchange of these data is not done with a specified frequency.

These flows of information between manufacturers and retailers also bring a risk of undermining competition between retailers, because they can facilitate mutual monitoring and even explicit coordination of their behaviours.

¹¹⁰ Several MB suppliers who were surveyed, mainly leaders in their categories, say they have collaborated on managing categories for some retailers, but only in the form of recommendations or guidance. Another manufacturer, leader in its category, specialises in managing its category for retailers and has a specific department dedicated to this area (this manufacturer even runs public advertisements in which it offers to optimise shelf space for retailers and states as its goals to make shelving neater and more attractive and shopping easier, to reduce breakage of stocks and boost sales). Of the ROB manufacturers, only one acknowledged that it makes sporadic recommendations on the category to its main retail distributor. And some manufacturers, follower brands or secondary brands, identify the major multinationals or category leaders as possible collaborators for retailers in category management. Nevertheless, several inconsistencies have turned up in the replies to the questionnaires: manufacturers who identify other manufacturers as managers when the latter have not acknowledged playing such role, and retailers who do not admit providing their manufacturing partners with information when the latter say they do receive such information.

- Manufacturers, for their part, confirm that, if the category manager is the retailer, the exchange of information generally refers to the sales volume of the market, obtained from public databases (IRI or Nielsen). Nevertheless, some manufacturers state they also exchange other information with retailers, such as for example:
 - Population or household data.
 - *Ad hoc* market studies in the category carried out by research institutes (studies of shopping behaviour, profiles, etc.).
 - Other types of information: customer flow charts, studies of hot and cold points within that flow, of impacts on price and rotation, etc.
- The manufacturers confirm that the exchange of information does not take place at a specified frequency, although several of them indicate that they take place at least once a year, and one response alluded to direct weekly exchanges of information with the retailer.

As for the information **exchanged with other suppliers**, all of the manufacturers say they have neither requested nor provided confidential data from or to any competitors for category management purposes. And 90% of the manufacturers say they have never been required to transfer information on the supplies or prices applied to other retailers. Only 10% say that such information has been requested of them sporadically.

Given that retailers emphasise that they hold the decision making power, it is not surprising that all of them say that no supplier has authority to give instructions to other suppliers on the management of the category. And the suppliers, for their part, confirm that they have neither given nor received instructions to or from a competitor.

As for possible discrimination between manufacturer and retailer brands in the category management activity:

- A very significant percentage of manufacturers, over 70%, say that retailers manage the category in a discriminatory manner to favour the retailer's private label. This practice represents the second most important complaint of manufacturers, topped only by commercial payments. Retailers also acknowledge that discriminatory category management is a relatively common complaint from their suppliers. Conducts of this type appears to be especially common in the cereal and vegetable oil categories, in which more than 70% of the respondents described their use as frequent.
- The manufacturers believe, in general, that this practice is particularly egregious and places them at a very important competitive disadvantage, with specific mention of the following types of discrimination:
 - A pricing policy that discriminates against the MBs, using cross subsidies between ROBs and MBs by increasing the mark-ups for the MBs and lowering them for the ROBs.

- Strategic shelf positioning that favours the retailer's brand, with the added disadvantage for the MB that the ROB pays no fee for such placement.
- Delisting without sufficient prior notice and, more specifically, replacing manufacturer brands with retailer brands.
- Refusal to accept the introduction of new products or point-of-sale promotional campaigns proposed by MB suppliers.

3.3.2.3. Conclusions

The risk of such schemes arising is lower when intrabrand competition is intense, which serves to further strengthen the advisability of reducing the restrictions that limit retail distribution competition in Spain.

The aforementioned risks that this practice poses for interbrand competition, that is, a reduction in the variety of brands, and the possible indirect harm for intrabrand competition as well, can be important, unless there is a sufficient degree of competition between retailers. Therefore, an indispensable condition for diminishing this risk is the elimination of all regulatory barriers that limit the ability of operators to compete in the retail distribution market; moreover, certain actions of the retailers generate significant uncertainty for suppliers and thus reduce their incentives for investment and innovation.

Some variants of this practice, such as delisting without prior notice and, in general, all those that entail discrimination against MBs by means of unilateral and unjustified modification of the agreed terms and conditions of supply, may be considered unfair trading,¹¹¹ because they exploit the possible economic dependence that suppliers may have on their retailers in the short term, and they may also harm manufacturer incentives to invest and innovate.

Furthermore, given that, even when the practices may be prohibited and sanctionable, suppliers do not have incentives to report them, because this could lead to reprisals that are difficult to demonstrate or punish, preference should be given to methods that allow these practices to be uncovered with minimal risk to the affected parties, including *ex officio* detection by the competent authorities or by an independent entity with capacity to arbitrate in these disputes.¹¹²

Also, although certain discriminatory category management practices cannot be classified as unfair to suppliers, they may lead to abusive behaviour by retailers toward consumers that may be captured by article 2 of the LDC,¹¹³ if they lead to a worsening of supplyside conditions in terms of price, quantity, variety or quality in the downstream retail markets in which the retailer holds a dominant position, taking into account that the relevant markets tend to

¹¹¹ Spanish Unfair Competition Act 3/1991. Unfair practices are only capable of violating the Competition Act 15/2007 of 3 July 2007 if they also affect the public interest and distort competition, in accordance with article 3 of the Competition Act.

¹¹² The Groceries Supply Code of Practice (GSCOP), approved by the UK Competition Commission in 2009, provides, amongst other measures, the establishment of an independent Ombudsman to oversee compliance, with submission to the Code being mandatory for retailers with turnover of more than one billion pounds.

¹¹³ A finding of violation of article 2 of the LDC requires a demonstration that the infringing company holds a dominant position and that the conduct is objectively abusive. Also, there may be certain conducts which are objectively justified and are necessary. See European Commission (2009), *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (2009/C 45/02), paragraphs 28 et seq.

be local and have strong barriers to entry by other retailers. A clear sign of this kind of abuse of consumers is the existence of retail conditions that are comparatively and significantly worse in markets where a retailer holds a dominant position.

On the issue of exchange of information, although no evidence has been obtained showing that category management arrangements are being used to exchange commercially sensitive information between manufacturers and retailers on their relations with other parties, we believe that the structure of the distribution market in Spain, characterised by a concentrated market, major barriers to entry and relatively strong dependence of the manufacturers of certain products on their distributors, facilitates the possibility of horizontal coordination of operators through “hub and spoke” arrangements.¹¹⁴ This type of information exchange may, of its own or in conjunction with other factors, fall within the scope of antitrust laws to the extent that it reduces competition between operators. In any event, the risk of such schemes arising is lower when intrabrand competition is intense, which serves to further strengthen the advisability of reducing the restrictions that limit retail distribution competition in Spain.

3.3.3. Use of the supplier’s image and commercially sensitive information for the benefit of the retailer private label

3.3.3.1. General characterisation

With the aim of optimising the management of their chain of retail outlets, retailers may require the manufacturer to provide commercially sensitive information with respect to its new product launches, planned promotional initiatives, etc. If a retailer has its own private label, the manufacturer brands compete on store shelves with the retailer’s own brands, thus giving the latter an incentive to use that sensitive information for the benefit of its brands.

In particular, the retailer could employ copycat conducts in its favour, that is, using or imitating the image or packaging of another brand (in size, colour, logo, etc.) to create confusion amongst consumers or to take advantage of the investments made by the MB supplier. Such behaviour is relatively common amongst manufacturers. However, the privileged access to confidential and sensitive information on the MB possessed by the retailer, even before new products are rolled out, tends to heighten the harm caused by this practice to the MB manufacturer who wants to use the large retailer channel to introduce its innovations, by making it easier for the retailer to copy in its private label the innovation introduced by the MB and take advantage of the promotional efforts made by the manufacturer in rolling out new products.¹¹⁵

This conduct may actually have certain positive effects in the short term. In product categories with a clear brand leader, in which entry onto store shelves by second and third tier brands is greatly hindered by the high costs

¹¹⁴ See CNC resolution C-0353/11 EBRO/SOS (Active), paragraph 134.

¹¹⁵ This effect may arise, for example, when the manufacturer gives prior notice of the new product launch and of the related advertising campaigns and the retailer simultaneously launches the same product with its own brand to capitalise on the advertising done by the manufacturer.

of marketing and promotion required to be present in the market, a ROB can be an important means of widening supplyside variety. To the extent that this increase can also diminish the market power held by the brand leader, the retailer's incentives for bringing out its own label may benefit consumers, even if those incentives stem from the retailer's greater ease of copying the manufacturer. Also, the greater competitive pressure exerted by the ROB may give MB manufacturers in the same product category incentives to step up their R&D spending to differentiate their brands from the ROB and offer consumers higher quality goods.

Nevertheless, conducts of this kind also contribute to discouraging the manufacturer's R&D investment in the medium and long term, because they entail a certain amount of "free riding" by retailers who benefit from the investments made by the manufacturer. If the retailer is too fast to "copy" a manufacturer's innovations in its own brand, the manufacturer's return on its MB spending, and hence its incentive to do so, will be cut sharply.¹¹⁶

In certain circumstances, "copycatting" and similar conducts may run afoul of unfair competition and industrial property laws, if they mislead consumers or impair the image of the imitated brand.

3.3.3.2. Incidence of the practice in Spain

The manufacturers consulted on these practices responded to two types of question: on the information sought by the retailer, in particular, if they had been unjustifiably required to provide confidential information and if, in their opinion, the retailer had used the information for its own benefit; and the other on the use or imitation of its brand image for the benefit of the retailer's brand. To judge from the replies received, shown in Table 19, both conducts have a relatively low incidence, with more than 60% of the responses coming back negative:

116 Ezrachi, A. (2010), "Unchallenged Market Power? The Tale of Supermarkets, Private labels and Competition Law", *The University of Oxford Centre for Competition Law and Policy Working Paper CCLP* (L) 27; and Bergès-Bontemps (2004) "A Survey on the Economic Impact of the Development of Private Labels", *Journal of Agricultural & Food Industrial Organization*, Vol 2.

Table 19Incidence of demand for information and *copycat* conducts

		Yes, frequent	Yes, on occasion	No	Total
D.1	“Unjustified” demands for confidential information from suppliers and use of that information (product rollout plans, R&D, promotional campaigns) for the benefit of the retailer's brand	8%	14%	77%	100%
D.3	Use or imitation of the supplier's image for the benefit of the retailer's brand	23%	15%	62%	100%

Source: Prepared in-house based on official requests for information sent to suppliers


By product category, copycatting and similar conducts have a greater incidence in mineral waters, with 50% affirmative replies, and canned fish, with 66%. Unjustified demands for information seem to be quite common in vegetable oils (43% affirmative replies) and in breakfast cereals, where half of the respondents say they are subject to such demands sporadically. On the other hand, all of the respondents in the milk segment say they have never been told to provide commercially sensitive information.

The differences are sharper when a distinction is made between suppliers who are category leaders and non-leaders. Approximately, 80% of the former believe their image has been used and 44% say they have received unjustified requests for information, compared with 32% and 20%, respectively, for the non-leaders. This difference is consistent with the greater incentive to copy the image or capitalise on the promotional efforts of a producer who has broad market penetration or greater consumer preference.

Suppliers of manufacturer brands emphasise the particularly pernicious effect of these practices, because the speed with which retailers can carry out the imitation introduces a major competitive disadvantage and an important disincentive for innovating given the increased difficulty in recovering the investments made. Some even say that retailers run no risk when introducing new products because they generally confine themselves to imitating the brands that have proven successful in the market.

3.3.3.3. Conclusions

Certain copycat conducts may be contrary to unfair competition and trademark laws, so reporting them may be a way of curbing the abuses associated with those practices, although the success of such complaints requires a demonstration of the risk of consumers being misled or deterioration of the imitated brand image.



The potential effectiveness of complaints, even where the practices are prohibited and sanctionable, runs into the reluctance of suppliers to file complaints due to the ensuing risk of retailer reprisals.

Also, as pointed out in relation to possible abuses in category management practices, the potential effectiveness of complaints, even where the practices are prohibited and sanctionable, runs into the reluctance of suppliers to file complaints due to the ensuing risk of retailer reprisals. This makes it advisable to favour, in these cases too, those methods that allow the practices to be discovered with minimal risk to the affected parties, including ex officio detection by the competent authorities or an independent entity with capacity to arbitrate these disputes.

Not all instances of utilisation by a retailer of information received from a supplier to benefit the ROB are sanctionable under antitrust and unfair competition rules. It is therefore considered advisable to set out the limits which retailers must respect in their use of these practices. Specifically, the information required of a manufacturer on the product in question must be confined to what is justified in the context of the retailer-manufacturer relationship. And the length of time between when the information is provided and the final launch of the product should be consistent with the specific characteristics of the process and justified by objective reasons. In all events, retailers must abide by clear, transparent, proportionate and non-discriminatory rules regarding the content and the advance timing of the information they seek from their suppliers.

3.3.4. Failure to put contract terms and conditions in written form and retroactive modification or breakoff of the contract

3.3.4.1. General characterisation

These practices span diverse means by which one of the parties fails to comply with a contract term or condition that has been agreed orally or in written form, without making adequate compensation to the affected party (specifically, drawing out the agreed payment periods).

In a context in which the retailers enjoy great bargaining power and there are situations of economic dependence, practices of this kind can reduce the incentive for manufacturers to invest and innovate.¹¹⁷

Both the failure to fix contract terms and conditions in advance and in writing, and non-agreed modifications of the contract not envisaged in the contract, increase uncertainty and add unexpected costs for manufacturers. For example, claiming a commercial payment not provided for in the contract, or a modification of the price when the product has already been ordered or delivered, raises the level of uncertainty and unexpected costs for manufacturers. Some breaches, such as retailer delays in making payments beyond the agreed timetable, also generate excessive transfer of financial risks to suppliers, even where the delay is not contrary to the legal rules on delinquent trade payments.

The increase in uncertainty, excessive shift of risks and the assumption of unexpected costs reduces the incentives for suppliers to invest in new

¹¹⁷ Competition Commission (2008), *The Supply of Groceries in the United Kingdom market investigation*.

products and processes and in capacity expansions, which will harm the efficiency of the manufacturing industry and distort interbrand competition, because it affects the smaller suppliers disproportionately.

From the standpoint of the laws and regulations in place, obtaining conditions not previously contemplated in the supply contract may be considered unfair competition under the LCD in a context of economic dependence. Indeed, according to article 16 of the LCD, on discrimination and economic dependence, it is considered unfair competition to obtain, on threat of a breakoff of commercial relations, prices, payment terms, sale arrangements, the payment of additional charges and other conditions for commercial cooperation that are not envisaged in the agreed supply contract.

As for the failure to set down the contract terms and conditions in written form and in advance, the CNC has on various occasions advocated the formalisation of contractual relations, provided the fundamental elements of the contract are freely negotiated between the parties. In particular, in the *Report on Competition and the Agrifood Sector* of 2009, the CNC stated that initiatives aimed at formalising commercial relations in contracts, and even using contracts officially approved by public institutions, contribute to preserving legal certainty and avoiding possible abuses between the parties, and cannot harm effective competition if the fundamental elements that define the content of the contract, such as prices, quantities and other terms and conditions, are freely negotiated between the parties. Similarly, in the *Report on the Draft Bill on Distribution Contracts*, released in June 2011, the CNC pointed out that the obligation to formalise the contract in written form, though limiting the principle of freedom of form that governs contract law, may be a proper option for ensuring legal certainty and for preventing situations of abuse by the party with greater bargaining power, without introducing undue burdens for the parties when it comes to formalising their relationship.

3.3.4.2. Incidence of the practice in Spain

The responses from suppliers indicate that not formalising contract terms and conditions in written form and retroactive modification or breakoff of the contract are relatively widespread practices, even though they are of medium incidence in relation to the rest of the practices examined in this Report.

Somewhat more than half of the suppliers surveyed state that retroactive modifications of the agreed contract terms and conditions have been applied to them frequently or occasionally in relation to commercial payments or other elements of the trade relationship. Breach of the terms of the contract and failure to put those terms into written form in advance affect, frequently or occasionally, some 42% and 35% of suppliers, respectively.

Table 20

Incidence of contract terms and conditions not being set down in written form and of the retroactive modification or breakoff of the contract in Spain according to the respondent suppliers

		Yes, frequent	Yes, on occasion	No	Total
A.1	Contract terms and conditions not set down in advance in written form.	15%	21%	64%	100%
A.2	Retroactive modification of agreed contract terms and conditions (for example, in relation to payments or overall discounts).	12%	44%	44%	100%
A.3	Breach of contract terms without adequate compensation. Specifically, lengthening of the agreed time frames.	19%	23%	58%	100%

Source: Prepared in-house based on official requests for information sent to suppliers

This group of practices is more frequently reported in the vegetable oil, rice and mineral water categories, goods which are characterised by a low degree of differentiation and intense price competition.

They also appear to have a relatively larger effect on suppliers specialised in manufacturer brands, and in particular, those who are not market leaders, which may suggest an especially harmful impact for the smaller manufacturers and, consequently, for interbrand competition.

Breach of the contract or unexpected changes to the contract affect commercial payments as well as other variables of the commercial relationship. For example, one-off payments are sometimes demanded in respect of future commitments by the retailers that eventually go unfulfilled. Unexpected changes include payment increases that have not been increased, or invoices for payments that are used indiscriminately and without prior approval or

explanation, or under the threat of retailer reprisals against the supplier in the commercial relation. There were also detected breaches in the “In & Out” strategy agreements, in which the supplier and manufacturer generally agree that, for the sale of a product during a stipulated time period, normally less than one year, there will be no returns or, if there are, that they will be limited. In practice, the amount returned by the retailer may depend on the success of the promotional initiative. The harm caused to a supplier by a breakoff of the contractual relationship is especially large when the relation is tied to the launch of a new product, because in such cases the manufacturer is unlikely to have many alternatives for placing the product in the market. These practices may therefore have a direct and markedly negative impact on the manufacturer’s incentives to innovate.

3.3.4.3. Conclusions

Taking into account the negative implications for efficiency, innovation and interbrand competition that arise from the practice of not setting contract terms and conditions down in written form and from retroactive modification or breakoff of the contract, it is considered advisable that:

- The contract terms and conditions governing the trade relationship between suppliers and large retailers should be executed in written form. Although this represents a limitation of the principle of freedom of form that governs contract law in Spain, this obligation may be more effective in preventing situations of abuse by the party with greater bargaining power, the existence of which is impossible to demonstrate if the specific terms of the arrangements are not known. Such obligation would not involve undue burdens for the parties when it comes time to formalise their relations.
- Retroactive changes, revisions or modifications in the contract terms and conditions, save for *force majeure* situations, should be limited to the circumstances provided for in the contracts and that they be proportionate to those circumstances, with the contract actually establishing, insofar as possible, the acceptable ranges for such changes. Also, the contracts should provide mechanisms for adequate compensation in the event these contingencies arise.

3.3.5. Establishment of most favoured customer clauses

3.3.5.1. General characterisation

A most favoured customer (MFC) clause provides that the manufacturer is obliged to apply to the retailer the same commercial terms and conditions as it offers other buyers.

These clauses may be retroactive or contemporaneous.¹¹⁸ Retroactive MFC clauses stipulate that the supplier will offer the retailer a reduction of the price if, in the future, other purchasers obtain a lower price. Contemporaneous MFC clauses commit the supplier to offering the retail the same price as it offers to other buyers. One implication of this type of clause is that they tend

¹¹⁸ Motta, M. (2004), *Competition Policy: Theory and Practice*, Cambridge University Press.

to homogenise the conditions established by a manufacturer for different distributors.

These clauses have various anti-competitive effects.¹¹⁹ First, they can limit effective and potential competition in retailing. On the one hand, by reducing the incentives to grant discounts and hindering price discrimination, they impede the entry of certain retailing models. On the other, they foster rapid alignment of retail prices and reduce the possible emergence of aggressive commercial strategies amongst retailers. Second, they contribute to facilitating horizontal coordination between manufacturers, by rendering more transparent any deviations from an inter-manufacturer agreement and reducing the incentives to deviate, because a discount they apply to one customer would have to be applied to all. Third, these clauses may serve to signal a non-aggression strategy by a manufacturer to which rival manufacturers may respond with similar non-aggressive strategies, with the consequent relaxation of competitive pressure between manufacturers.

In addition, MFC clauses may facilitate indirect coordination between retailers similar to what is described for category management agreements, to the extent that effective implementation of the clause entails a transfer of information between retailer and supplier in relation to the prices charged by the supplier to other retailers. This information may be considered commercially sensitive and serve as a basis for “hub&spoke” coordination. And there is other information, such as data on final retail prices of the supplier’s products in the establishments of other operators, which though partly originating from public information, can also be considered a trade secret if it is not readily available to third parties other than at an aggregate level.

These clauses may nonetheless generate certain efficiency gains. Specifically, they provide a safety mechanism for risk-averse retailers. For example, a retroactive most favoured customer clause secures the retailer against the possibility that only certain retailers with which it competes will benefit from future price shocks, and, consequently, can encourage the retailer to acquire larger stocks and commit more fully to selling the products.

3.3.5.2. Incidence of the practice in Spain

According to the survey performed, the establishment of most favoured customer clauses is one of the least common practices included in the analysis performed in this Report. Some 67% of responding suppliers say that these clauses are not applied, compared with 34% who indicate that they are used frequently or occasionally.

The impact of these practices is relatively larger in vegetable oils (where 43% of suppliers claim they are frequent or occasional), mineral waters and canned fish. And, in turn, they affect the manufacturer brand leaders more than the non-leaders, which may be explained in part by the greater discriminatory capacity wielded by the former. Lastly, these clauses predomi-

¹¹⁹ Baker J. (1996), “Vertical Restraints with Horizontal Consequences: Competitive Effects of “Most-Favored-Customer” Clauses”, *Antitrust Law Journal*, vol. 64, pgs. 517-34.

Loss leading can contribute to giving an establishment a reputation as low-priced and intensify competition.

nate more amongst MB manufacturers than amongst those specialising in producing retailer brands.

In the contracts and other type of contractual instruments analysed in connection with this Report, and in the replies to the questionnaire, except for rare occasions, no explicit documentary proof has been detected of the establishment of MFC clauses or of demand for commitments similar to such clauses.

3.3.5.3. Conclusions

In the context of a market structure characterised by a high degree of concentration in retail distribution, by the growing bargaining power of the major retailers and by the existence of important entry barriers, most favoured customer clauses can act as a significant strategic restriction on competition and diminish effective and potential competition in retailing. If, moreover, these clauses are established on the basis of the supplier's prices to other retailers, or imply that the supplier must disclose to the retailer the retail prices of its products in the establishments of competitor retailers, or in other sales channels, whether explicitly or implicitly, then they are very like to constitute a violation of competition rules.¹²⁰

3.3.6. Loss leading

3.3.6.1. General characterisation

Generally speaking, the term 'loss leading' refers to selling products at a loss, that is, at below their cost of acquisition. According to article 14.2 of the law regulating the retail sector, Act 7/1996 of 15 January 1996 (Ley de Ordenación del Comercio Minorista — LCM), there is selling at a loss when the price applied to a product is lower than its invoiced price of acquisition (after deducting the proportional part of the discounts included there) or, if lower, than its price of replacement, or than the cost of production if the article was produced by the merchant itself.

From the retailer's standpoint, selling at below cost may serve to solve a problem of information and create the image of a competitively priced establishment.¹²¹ Consumers do not normally have full information on the quality and prices of each retailer. Buyers therefore guide their purchase decisions by the reputation of each retailer on quality, variety and price. By setting low prices for certain products commonly referred to as "hooks" or "magnets", retailers invite shoppers to make price comparisons between stores on the basis of the prices of those goods. In this context, loss leading can contribute to giving an establishment a reputation as low-priced and intensify competition.

¹²⁰ All of this is without prejudice to the need for a competition analysis to be carried out on these clauses, having regard to the concrete circumstances of each case and without prejudice to the possibility of defending efficiencies that is provided for in article 1.3 of the LDC and article 101.3 of the Treaty on the Functioning of the European Union.

¹²¹ London Economics (1997), *Competition in Retailing*, study prepared for the OFT.

Creating an image of a competitively priced outlet helps retailers attract consumers to their establishments¹²² and, once there, those shoppers do not limit their purchases to those loss leaders and they also buy other goods that are priced above their cost. The retailer can thus obtain higher mark-ups on this second group of products, offset the losses incurred in the first and maximise its profit.

Loss leading also allows merchants to take advantage of demand interdependence between products. In goods for which the demand shows asymmetric cross-product externalities,¹²³ a retailer may maximise profits by pricing one of the products low.

Loss leading can help a retailer in other cases as well,¹²⁴ for example: when the retailer has excess stocks or perishable goods that are going to deteriorate, or demand drops off sharply, or the retailer has overestimated its sales and has excess inventory; when the retailer is affected by a temporary spike in costs, as a means of retaining its clientele; or to facilitate the success of a new product promotion as a means of stimulating consumers to try it.

For all of these reasons, loss leading has pro-competitive traits that may enhance consumer welfare. The prohibition on loss leading entails a greater risk for the retailer, because it limits a merchant's capacity to move stock out or sell at the desired pace, and this may lead the retailer to acquire less than optimum quantities of goods.

Nevertheless, this practice also poses risks for competition between retailers and for manufacturers, if the loss-leading retailer has a certain amount of market power.¹²⁵

- In these circumstances, loss leading by some retailers can help drive other retailers out of the market, with the consequent reduction of competition and increase in prices. In fact, if the loss-leading retailer holds a dominant position, this conduct may constitute predatory pricing and abuse of dominant position under article 2 of the LDC or article 102 of the TFEU.
- Also, the use of loss leaders can harm manufacturers in various ways. If the use of this commercial strategy diminishes the perceived quality of the product, the manufacturer may find itself obliged to reduce its prices and/

122 Tan G. (2001), "The Economic Theory of Vertical Restraints", working paper prepared for the Competition Bureau of Canada.

123 Asymmetric cross-product externalities in demand for products is considered to exist between product A and product B when higher demand for A increases the demand for B, but not vice versa (Tan G. (2001). When such asymmetry is strong, a retailer may optimise its profits by pricing product A low, even below its marginal cost. In general terms, when the demands for different products are interdependent, there may be cross subsidies between the products. For example, a retailer may sell lasagna pasta at below cost in order to boost demand for tomato, ground beef and cheese. These pricing strategies are also seen in the "aftermarkets" (when the manufacturer controls supply to the secondary market, an optimum strategy is usually to loss lead with the primary product and recoup profits with the sale of the secondary products). Examples of this type of primary and secondary products are coffee makers and the coffee capsules, or electric toothbrushes and the replacement brushes.

124 Competition Bureau (2002), *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) as Applied to the Canadian Grocery Sector*.

125 OECD (1998), *Buyer Power of Multiproduct Retailers*, Policy Roundtables.

or its sales, and even curtail production capacity, with the attendant negative impact on its incentives to innovate and maintain the product quality. In addition, faced with a retailer that wields buyer power, the manufacturer of a loss-leader product may not have alternatives for switching to another retailer, even where that strategy is harming its interests. And ultimately, loss leading has a direct effect on the price structure of a product category, as it brings strong pressure to bear on all manufacturers in that category. Therefore, in a context of a retailer with buyer power and its own private label, loss leading can be used as a tool for strengthening that retailer's bargaining power vis-à-vis the manufacturers in the category.

Apart from the restrictions that apply under the LDC, both the LCM and the Unfair Competition Act 3/1991 of 10 de January 1991 (Ley de Competencia Desleal; hereinafter, LCD) include certain prohibitions on selling at a loss. According to article 14.1 of the LCM, merchants cannot offer or make sales to the public at a loss except a) when the aim in so doing is to match the prices of one or more competitors with capacity to significantly affect its sales, b) sales of perishable goods close to their expiry date, or c) liquidation sales.

And the LCD, in turn, in article 17, provides that selling at below cost or at below the price of acquisition will be considered unfair trading if: a) it is liable to mislead consumers in relation to the price levels of other products or services in the same establishment, b) it has the effect of discrediting the image of another product or establishment, or c) it forms part of a strategy aimed at eliminating a competitor or group of competitors from the market.

In any event, in reference to the current legal regulation of loss leading, the 2009 CNC Report *Reforming the Retail Sector Regulatory Act in the context of the transposition of the Services Directive* concluded that loss leading which is not accompanied by any of the conditions established in the rules on unfair competition, and does not involve abuse of dominant position, represents an advantage for consumers by allowing them to acquire the product on better terms. For this reason, it argued that the near blanket prohibition on loss leading had no compelling rationale, and recommended that article 14 of the LCM be eliminated, so that selling at a loss would only be subject to the provisions of competition and fair trading laws, namely, the LDC and LCD.

3.3.6.2. Incidence of the practice in Spain

According to the survey performed, suppliers state that loss leading has a medium incidence in relation to the rest of the practices analysed in this Report. More than half of the manufacturers surveyed state that it never takes place, whereas 29% classified the practice as frequent and 17% held it only takes place occasionally.

By product category, loss leading mainly affects the “hook” products that can serve as loss leaders. Thus, the percentage of suppliers that say this practice is frequent rises to 71% in vegetable oils and 43% in milk. Conversely, its incidence is much lower, for example, in other dairy products such as yoghourts.

The practice also has a greater effect on suppliers specialised in manufacturer brands, some 33% of whom classify it as frequent, compared with 17% amongst manufacturers of retailer brands.

There is enough evidence to suggest that, in certain cases, retailers may be engaging in loss leading, but not enough to be able to determine whether this practice is being pursued in the conditions which under the applicable laws brings them under the legal prohibition on selling at a loss.

3.3.6.3. Conclusions

Without prejudice to the prohibition on loss leading in the situations envisaged in the current laws on competition and fair trading, the competition risks of loss leading would be diminished in any event if there were more intrabrand competition, which would also decrease the buyer power of retailers. This is an additional argument for the advisability of intensifying competition in retailing by eliminating the legal restrictions which now curb that competition.

3.3.7. Blind auctions

3.3.7.1. General characterisation

Businesses may use different procurement mechanisms for acquiring supplies of the goods and services they trade; one of them is to carry on auctions in successive rounds.¹²⁶

The development of procurement techniques involving telematic procedures includes electronic or online auctions. In these auctions, the winning bid is selected after successive improved bids are presented telematically until the time limit expires or until no new bids are received. The bids are disclosed so that the interested parties can improve them within the stipulated time frame.

Companies do not normally use auctions as their customary procurement method, and tend to use them when demand spikes or in order to carry out a specific promotional activity for a particular product. The reference variable negotiated is normally the price. Blind auctions are those in which no participant knows who the other bidders are or the terms of the bids.

The successive-round blind auction system has the following pro-competitive features:

- From an economic standpoint, successive-round auctions provide the most efficient procurement mechanism because the bidders may revise their initial bids to adjust them to the real value they attribute to the contract. The retailer is thus able to contract with the supplier who assigns the

¹²⁶ From a theoretical standpoint, there are different types of auctions, the most common being the English or ascending price auction, the Dutch or descending price auction, first-price sealed bid auction and the second-price Vickrey auction.

The main problem with blind auctions lies in their possible manipulation by the bid-taking retailer, who may intervene to distort the result and drive the price down.

most value to the contract and who is therefore willing to supply the goods at a lower price in order to win the contract.¹²⁷

- Using blind auctions can mitigate one of the drawbacks of successive-round auctions: the danger of collusion.¹²⁸ To hinder coordination between bidders, the economic literature recommends that no information be disclosed during the process that could increase the possibility of collusion (number or names of the bidders, the reserve prices, etc.).¹²⁹ The less information of this type that is provided to bidders during the process and on the results, the more difficult it will be for them to collude in that auction or in future ones.

The main problem with blind auctions lies in their possible manipulation by the bid-taking retailer, who may intervene to distort the result and drive the price down. This risk is greater when the retailer has not made any commitment to award the contract and has the option of cancelling the auction for lack of appropriate bids. Also, failure to define the terms of the contracts referred to by these auctions introduces uncertainty into the contractual relations, which, as already discussed, tends to reduce manufacturer incentives for investing in new products and processes and in capacity, with negative repercussions for supply-side efficiency, and may distort interbrand competition by having a proportionally greater effect on the smallest suppliers, who are generally less able to take on risks.

Distortion of the terms of the auction by the supplier may be considered an infringement of the Unfair Competition Act.

3.3.7.2. Incidence of the practice in Spain

In Spain, 27% of the manufacturers surveyed say they have participated at some time in supplies through blind auctions, but only 8% regard this as a frequent practice. According to these data, of all the practices examined, blind auctions would be one of those with the least incidence.

No significant differences in its incidence are observed by type of manufacturer (whether ROB, mixed or MB leader/non-leader), but there are notable distinctions depending on the sector analysed. In yoghourts, bakery goods and cereals, the incidence is nil. But 53% of the respondents in the vegetable oils sector say these auctions are frequent¹³⁰ and 67% of the manufacturers

¹²⁷ Nevertheless, auctions do not ensure that the contract will be made on the best possible terms, those which the bidder who most values the contract would actually be willing to offer, but on the terms of the second best bid plus the minimum improvement.

¹²⁸ Klemplerer, P. (2005), *Bidding Markets*, document prepared for the Competition Commission. The high probability of collusion comes about for various reasons: the auction allows coordination by participants without the need for any prior communication between them, except perhaps to determine who will win; the formal rules of the auction, especially if they are recurring, also facilitate negotiation of agreements and communication between bidders; the auction reduces the incentives of participants to break off an agreement if one exists and, what is more, the auctions allow the presence of bidders not party to the agreement to be detected and monitored. From a dynamic standpoint, the transparency of the auctions allow prices and conducts to be identified.

¹²⁹ Kovacic, W. et al (2006), "Bidding Rings and the Design of Anti-Collusion Measures for Auctions and Procurements", *Handbook of Procurement*, Cambridge University Press, pgs. 381-411.

¹³⁰ Specifically, 53% regard it as a frequent practice, 0% as sporadic and 47% say it never takes place.

of canned fish say they are sporadic.¹³¹ Commodities, with their negligible differentiation, together with a possible situation of oversupply in the sector (as is the case, for example, in vegetable oils), appear to be important factors in the decision to conduct procurement using this procedure, which is especially effective when price is the key determinant.

3.3.7.3. Conclusions

Taking into account the potential pro-competitive effects of these auctions, as an efficient mechanism for procurement and for combating collusion, and the lack of signs of possible rigging of the auctions by the retailers who organise them, it is considered sufficient here to remind the operators involved that unilateral manipulation of auctions by the retailer may constitute unfair trading.

3.3.8. Establishment of supply exclusivity clauses

3.3.8.1. General characterisation

Exclusive supply refers to contract terms and conditions that oblige or induce the supplier to sell the contract products solely or primarily to one buyer. For the purposes of this Report it mainly refers to situations in which a retailer obliges a manufacturer to make the retailer its only customer for its MB or ROB products or for both types.

From the standpoint of competition, the main risk of exclusive supply arrangements lies in the exclusion of competitor retailers. Exclusivity agreements signed by a retailer may hinder the capacity to compete of its rival retailers, increase their costs and even drive them out of the market. The risks of exclusion increase the bigger the part of the market covered by the suppliers party to the agreements, and the stronger the exclusivity ties in terms of duration and degree of exclusivity. Other factors that can aggravate the anti-competitive effects of this practice are high entry barriers in the suppliers market, limited countervailing power of suppliers, or a high degree of differentiation of the product in question.¹³²

Intrabrand competition is the main determinant of the antitrust risks posed by this practice.¹³³ If intrabrand competition is weak, the supply exclusivity is likely to aggravate the situation; conversely, where intrabrand competition is strong, no appreciable negative impact for consumer welfare should be expected.

Exclusive supplies may also generate efficiency:

- First, if there are horizontal externalities between retailers, an exclusivity clause may stimulate retailers to become involved in promoting their own brand, as this averts any “free riding” by its rivals on the investments made

¹³¹ Specifically, 0% regard it as a frequent practice, 67% as sporadic and 33% say it never takes place.

¹³² European Commission (2010), *Guidelines on Vertical Restraints*.

¹³³ European Commission (2010), *Guidelines on Vertical Restraints*.

by the retailer.¹³⁴ For example, if a retailer invests in developing its own private label, for instance, to carry out market research or a training course for employees of the supplier who will make the ROB, that supplier may also manufacture for other retailers, who would thus be able to benefit from the investment made by the first, which would probably eliminate the incentives for making such investments. An exclusivity clause avoids this risk and therefore contributes to keeping investment at an optimal level.

- Second, the exclusivity may generate economies of scale in retail distribution.¹³⁵ The concentration of the suppliers' sales in a single retailer may increase efficiency in relation to promotion and logistics and thus reduce the final price of sale.

3.3.8.2. Incidence of the practice in Spain

According to the results of the survey, retailer influence over suppliers in order for them not to supply other parties (exclusivity agreements) or for the suppliers to raise the prices applied to other retailers, has a medium-low incidence in relation to the overall set of practices examined in the Report. For 10% of the suppliers surveyed this is a frequent practice, whereas 23% regard it as occasional only and 67% say it is never applied.

By product category, the data point to a greater incidence in vegetable oils (where 29% of responding supplies say it frequent), mineral water (17%), and milk and rice (14% in both).

Other data that confirm the scarce incidence of exclusivity arrangements are the absence of clauses of this kind in the supply contract documents analysed for this Report, and the replies obtained to more precise questions in the questionnaire on exclusivity conditions in supply contracts. Specifically, retailers were asked if their main suppliers supplied them on an exclusivity basis, and manufacturers if they supplied their main retailers on an exclusivity basis.¹³⁶ On the retailer's side, only one has confirmed exclusivity agreements with its principal suppliers, although the portion of its supplies covered by those agreements is small. As for manufacturers, only three of 46 indicated they have exclusivity relations with one or more of their main retailers.

In any event, exclusive relations with retailers are relatively more frequent amongst ROB producers than MB producers. To deepen an understanding of these exclusivity relations in ROB supplies, an analysis was carried out to determine if the suppliers of a retailer's main private label articles also supply

¹³⁴ Dobson, P. (2008), "Buyer-driven vertical restraints", document presented at the conference *Pros and Cons of Vertical Restraints* held in Stockholm in November 2008.

¹³⁵ European Commission (2009), "Competition in the food supply chain", accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *A better functioning food supply chain in Europe*.

¹³⁶ The term "principal suppliers" has been defined as those who account for more than 10% of the purchase of a retailer in a product category, and, similarly, the "principal retailers" of a supplier are those that account for more than 10% of its sales in a product category.

the main private label products of other retailers.¹³⁷ In Table 21 we see the results, with an indication for each retailer of the percentage of the suppliers of its main ROB articles who also supply other retailers with their main products.¹³⁸ Obviously, the larger the percentage of common ROB suppliers, the weaker the ties between those suppliers and the retailers. As can be seen, the main ROB suppliers are often not exclusive to each retailer.

Table 21

Percentage of ROB suppliers of a retailer who are present in other retailers. 2010

Retailers	% of ROB suppliers present in other retailers
Retailer 1	67%
Retailer 2	50%
Retailer 3	50%
Retailer 4	33%
Retailer 5	56%
Retailer 6	20%
Retailer 7	5%
Retailer 8	0%
Retailer 9	40%

Source: Prepared in-house based on official requests for information sent to suppliers.

Note: The % indicate the percentage of ROB suppliers included in the six main articles of each retailer in eight specific product categories who are also suppliers of another retailer there.

137 The study was based on data obtained using a questionnaire with the suppliers of the six main articles of each retailer in the eight selected product categories: vegetable oils, waters, rice, breakfast cereals, fish conserves, milk, bakery goods and yoghourts. Within each category a variable sample was selected of the 4-8 main suppliers to retail distributors, as a function of the product category.

138 For each product category, the data of the producers of the six main products of each retailer were crossed. The percentage indicated in Table 21 underestimates the presence of suppliers as suppliers of ROB goods to other retailers, because only the six main articles of each retailer in that category are taken into account.

3.3.8.3. Conclusions

The establishment of exclusive supply clauses in MB or ROB contracts may, in certain situations (the larger the part of the market in which the exclusive suppliers operate, and the stronger the exclusivity obligations in terms of duration and degree of exclusivity), qualify as a vertical restraint contrary to competition rules. The available evidence indicates that this practice is relatively rare in Spain, and no signs have been found of situations at risk of violating those rules.

3.3.9. Imposition to purchase goods or services offered by a third party

3.3.9.1. General characterisation

This practice, in which the retailer obliges the supplier to acquire goods or services from a third party, forms part of a more general class of conducts in which the retailer imposes on the supplier its preferences regarding the provision of certain services or the use of particular inputs, such as, for example, the use of a container with specific characteristics that are better suited to the image of the distributor's retail outlets.

Imposing the purchase of goods or services from a third party in a context characterised by the existence of major retailers with buyer power can restrict competition between manufacturers in various ways. For example, by preventing manufacturers from acquiring those goods and services from other, more efficient sources, which will reduce the manufacturer's capacity to compete with manufacturers who are not subject to this obligation.¹³⁹ This would be the case when the retailer selects the undertaking that will provide the accessory services to the supplier based on criteria other than efficiency, such as charging that service provider for being selected, or because it holds an ownership or some other interest in the business carried on by the selected third party. This practice can also limit competition in the market of the suppliers of goods and services of those third parties; specifically, if there is a tie between the third party and the retailer, the latter may use its position in the retailing market to expand its share of the outsourcing market and eventually reduce competition there.

Nevertheless, there should also be taken into account the possible efficiency benefits of these practices, which is clearer in the case of ROB products, where the retailer has a more active role in the production and development of the brand. Thus, for example, requiring the use of a given supplier of packaging or of transport services for the retailer's private label in order to control the quality of the product can help the retailer establish a brand image. And this practice can also contribute to reducing negotiating costs and to generating economies of scale in retailing: for example, average packing costs may be lowered if this activity is concentrated in a sole supplier, and, in general, by imposing a specific supplier for a given activity, the retailer may improve the coordination of its own suppliers and generate efficiencies.

The establishment of exclusive supply clauses in MB or ROB contracts may, in certain situations qualify as a vertical restraint contrary to competition rules.

¹³⁹ Competition Commission (2000), *Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom*.

3.3.9.2. Incidence of the practice in Spain

According to the survey of suppliers, this practice has a relatively low incidence in comparison with the rest of the practices analysed in the Report.

Of the suppliers surveyed, 75% say it is never applied, 21% indicate that it is done occasionally and only 4% answer that it is frequent. Except for vegetable oils, this same pattern is seen in all of the sectors studied, and in some (milk, yoghourts) it does not even occur occasionally, according to the answers received. Conversely, in vegetable oils, 29% of the respondents say it is frequent and 66% that it occurs occasionally. By type of manufacturer, it appears to affect ROB manufacturers more than MB producers, although the differences are not very wide.

The analysis of contracts and other types of contract documents obtained in the research for this Report did not detect clauses that explicitly establish obligations to contract services or buy goods from third parties and, save for one exception, no complaints were voiced regarding the possible anti-competitive implications of this practice. According to the retailers, the recommendations or suggestions regarding certain suppliers of those goods and services, as opposed to impositions, would be more frequent.

3.3.9.3. Conclusions

In summary, the available evidence for this practice, which appears to have only minor incidence, except in vegetable oils, does not support the conclusion that it is, in general, having a negative effect on competition. Furthermore, its greater incidence amongst ROB suppliers seems to indicate that the search for greater efficiency in terms of strengthening brand image or generating economies of scale in retailing plays a significant role in those cases where this practice is carried out.

3.3.10. Tying the commercial relationship with the manufacturer brand to the obligation to produce the retailer's private label

3.3.10.1. General characterisation

On occasions, a retailer may make its purchase of manufacturer brands conditional on the manufacturer also producing the retailer's private label. Such arrangements form part of a group of practices whose common characteristic is to make the purchase conditional on the supplier granting certain concessions that it would probably not make unless the retailer had considerable buyer power.

This practice contributes to weakening the manufacturer's incentive to innovate because it allows the retailer a "free ride" on the manufacturer's innovations, and may also reduce intrabrand competition if only the strongest retailers are consequently able to obtain the manufacturer brand leader.

Nevertheless, it may also be pro-competitive in a situation in which the retailer does not have major market power, by allowing it to develop its own private label and thus intensify competitive pressure, in particular, in sectors where

interbrand competition is weak. And it may also help cut costs and generate economies of scale in retail distribution.

3.3.10.2. Incidence of the practice in Spain

According to the survey, 80% of the suppliers say that the commercial relationship with the MB is never tied to an obligation to produce ROB; only 10% regard it as sporadic and another 10% cite this as a frequent practice. Of the practices included in the analysis, this is one of the three with the lowest incidence.

By type of product, this practice has greater incidence in vegetable oils and milk, and, conversely, is minimal in canned fish and mineral water. Furthermore, its incidence is larger amongst manufacturers specialised in producing their own brands and ROB or mainly ROB, and amongst manufacturers who are not market leaders.

3.3.10.3. Conclusions

The available evidence indicates this practice has scarce incidence and does not appear to be raising widespread competition problems. In any event, to limit its possible negative impact, intrabrand competition should be promoted by eliminating the legal restrictions that are constraining and thus harming the general welfare.

3.4.

Initiatives in other countries

In recent years, other countries have undertaken initiatives to analyse or regulate commercial practices in grocery retailing. These include the investigations carried out in the United Kingdom (2008), Australia (2008), Portugal (2010), France (2010) and Sweden (2011), and the European Commission's recent study on innovation (2011). These works join the others pursued by the European Commission and the European Parliament since 2008 in the food sector.

3.4.1. United Kingdom

In 2008 the Competition Commission (CC) carried out a study, *The supply of groceries in the UK market investigation*, in which it analysed the incidence of 52 commercial practices relating to the bargaining power of retailers that are capable of distorting competition and involve a transfer of risks and costs to manufacturers. Based on the evidence found, the CC concluded that 30 of those retailer practices were capable of distorting interbrand competition, and 18 of them also distorted intrabrand competition. The CC also found a high level of local market concentration, and therefore recommended that "competition tests" be devised for the opening of new establishments.

As a result of this investigation, in 2009 the CC approved a set of good commercial practices for the grocery retailing sector, the Groceries Supply Code of Practice (GSCOP).

The GSCOP expanded upon and improved the previous code from 2000 (Supermarkets Code of Practice). Compliance with the previous code was voluntary and its effectiveness was limited by the small number of operators who signed it and by the absence of a dispute resolution mechanism.

To overcome those problems, the GSCOP, amongst other measures, provided for the creation of an independent body, the Ombudsman, and included within its scope, on a mandatory basis, all retailers with turnover of more than one billion pounds.

3.4.2. France

In the case of France the problematic commercial practices are defined in the relevant legislation and disputes are resolved by the ordinary courts. The August 2008 French Law on Modernisation of the Economy injected greater flexibility into negotiations between retailers and suppliers in relation to time frames, prices and conditions. Nevertheless, to provide assurances to producers, the list of prohibited conducts was reinforced,¹⁴⁰ as well as the penalties in the event of abuse.

The commercial practices that could be considered anti-competitive are set out in the French Code of Commerce, specifically in article L 442-6 of Chapter 2 “*On anti-competitive practices*”. The practices that are expressly prohibited include listing fees, threats of delisting, breakoff of the trading relation without prior notice and payments for non-commercial activities. In addition, any other type of practice that could be considered anti-competitive (“restrictive of competition”) are liable to be treated as prohibited conducts, given the general way in which some of the articles are drafted (for example, the prohibition on abuse of a relation of dependence or of signing contracts that may be considered imbalanced). In France there is a Commission for the Examination of Commercial Practices, composed of different representatives from all links in the value chain and from administrative authorities and the courts. The Commission issues recommendations and reports, specifically on the development of “Good Commercial Practices”, and acts as an observatory of commercial practices, publishing an annual report on the number of infringements involving practices prohibited in the Code of Commerce.

More specifically, the French competition authority (*Autorité de la Concurrence*) has recently conducted a study of category management agreements.¹⁴¹ The report concludes that the possible negative effects on competition of such arrangements will depend on the decision making power of the category captain, on the transparency of the agreements and on the breadth of the category for which they are defined. The *Autorité* considers that the Commission for the Examination of Commercial Practices can play an important part in drawing up good practices for these agreements and in monitoring them.

¹⁴⁰ In 2008 new prohibited practices were written into the code; for example, most favoured customer clauses or refusal to honour manufacturer requests to have their name included on the label of ROB products.

¹⁴¹ *Autorité de la Concurrence* (2010), *Avis n° 10-A-25 relatif aux contrats de «management catégoriel» entre les opérateurs de la grande distribution à dominante alimentaire et certains de leurs fournisseurs*.

The October 2009 Communication from the European Commission *Competition in the food supply chain* recognised that it is impossible to generalise about the possible anti-competitive harm of certain commercial practices and the need for an analysis on a case by case basis.

3.4.3. Australia

The Australian competition authority (*Australian Competition and Consumer Commission, ACCC*) in 2008 issues its *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*. The ACCC found the sector to be fairly competitive although it did identify barriers to entry and to expansion. The ACCC did not encounter problems in the sector's functioning, nor in the relations between manufacturers and retailers. Although it did recognise the potential of retailer brands to distort competition, its investigation found little empirical evidence to back this up and considers ROBs pro-competitive.

Australia also has a *Produce and Grocery Industry Code of Conduct*. It was originally developed by the industry itself, is voluntary and provides internal procedures for resolving disputes. It is revised every three years.

3.4.4. Portugal

In December 2010 the Portuguese competition authority published a report on the trading relations between grocery retailers and producers.¹⁴² The study identified certain commercial practices that may be problematic and which might not come within the scope of competition legislation. The report's recommendations were aimed at improving the collection and handling of statistics throughout the supply chain, encouraging voluntary codes of conduct, creating a committee to improve the regulation of commercial practices and enhancing the monitoring and supervision of those practices.

3.4.5. Sweden

The Swiss competition authority released a study in 2011 on grocery retailing. The report found that, in general, the food supply chain functions efficiently and that there are no significant problems. It nevertheless concluded that the regulatory framework could be improved in various areas, for example, by limiting associations between producers, reducing barriers to imports and other restrictions associated with the PAC, and facilitating the grant of municipal licences for the opening of new commercial establishments.

3.4.6. European Union

The October 2009 Communication from the European Commission *Competition in the food supply chain* recognised that it is impossible to generalise about the possible anti-competitive harm of certain commercial practices (including those involving retailer brands) and the need for an analysis on a case by case basis. It also pointed to the advisability of joint work by the competition authorities of the Member States to coordinate their future actions.

In this regard, the European Commission's High Level Group on the Competitiveness of the Agro-Food Industry proposed in its 2009 Report the creation

¹⁴² Autoridade da Concorrência (2010), *Relatório Final sobre Relações Comerciais entre a Distribuição Alimentar e os seus Fornecedores*.

of a European Forum of different agents in the distribution sector to analyse issues affecting the agro-food sector, with the participation of private agents, the *High Level Forum for a Better Functioning Food Supply Chain*. The Forum has been working since the end of 2010 and has set up working groups to take up different aspects of these issues.¹⁴³ One of these groups, on commercial practices in the food supply chain, recently presented its preliminary conclusions, which lay down general principles reached by consensus of representatives of producers, manufacturers and retailers and aimed at ensuring fair trading in the food supply chain. These conclusions are expected to be presented at the second meeting of maximum representatives of the High Level Forum scheduled for late November of this year.

Recently, in April of 2011, the DG Enterprise and Industry published the document *The impact of private labels on the competitiveness of the European food supply chain*, mentioned further above.¹⁴⁴ The main conclusion of that report is that the innovation and competitiveness of the European agro-food industry does not appear to be endangered by pressure from retailer private labels, except in the case of Spain, where the study found that the introduction of new products is comparatively low.

The study concludes that the growing penetration of private labels does not *per se* harm competition. In fact, private labels broaden consumer choice, unless they replace the industrial brands, and probably contribute to lowering prices. But the study indicates that attention needs to be paid to inequality in bargaining relations between manufacturers and retailers, and that certain commercial practices, such as “copycatting” or payment delays, can distort competition or affect the viability of other companies.

In relation more specifically to the area of competition, on 1 June 2010 there came into effect Regulation (EU) 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, sponsored by the Competition DG. The Guidelines accompanying the Regulation dedicate two chapters to analysing the possible effects on competition of vertical practices very directly related to grocery retailing, such as category management agreements and slotting allowances.

EU action is complemented by intense parliamentary activity in relation to grocery retailing, notably including the *European Parliament resolution of 7 September 2010 on fair revenues for farmers: a better functioning food supply chain in Europe*, and the *European Parliament resolution of 5 July 2011 on a more efficient and fairer retail market*.

¹⁴³ The expert platforms or working groups created are: Business to business (B2B) contractual practices in the food supply chain, Observatory of prices, Competitiveness in the agro-food Industry and agro-logistics.

¹⁴⁴ See section 2.4.4.4 of this Report.

4.

Regulatory barriers in
conditions for setting up
and operating retail outlets



4.

Apart from the commercial practices analysed in the preceding section, the other factor that increases the risk that the higher retailers' buyer power will lead to a welfare loss in the long term are the regulatory barriers on the establishment and operation of retail establishments.

The transposition into Spanish law of *Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market* (hereinafter, the Services Directive) was done through Act 17/2009 of 23 November 2009 on free access to and exercise of service activities (known as the Umbrella Law). That law established a general regime of freedom to set up and carry on service activities throughout Spain, and regulates as exceptional the situations that allow restrictions to be placed on those activities.

The 47 national legal norms affected by the Services Directive have been adapted through a horizontal instrument, Act 25/2009 of 22 December 2009 amending diverse laws to bring them into line with the Act on free access to and exercise of service activities (Omnibus Law). In relation to retailing, however, lawmakers opted for a separate reform via Act 1/2010 of 1 March 2010, reforming Act 7/1996 of 15 January 1996 regulating the retail sector (LCM).

The most significant modification introduced by this reform was the elimination, as a general rule, of the requirement laid down in article 6 of the LCM of 1996 to submit the set up of large retail establishments to the grant of a specific licence by the competent regional government, in addition to the requisite municipal authorisations, which had thus given rise to a dual licensing system.¹⁴⁵ Nevertheless, the new rules authorised regional governments to establish specific authorisation schemes in the presence of overriding requirements relating to the public interest, such as protection of the environment and the urban environment, land use planning and conservation of historical and artistic heritage, provided those authorisations are granted on the basis of proportionate, non-discriminatory, clear and unambiguous, objective criteria that are made public in advance, predictable, transparent and accessible, with explicit emphasis that those authorisation schemes cannot be based on economic tests. Lastly, Provision Seven established a system for compensation of debts of the competent public authorities to the General State Administration in the event of breach of the Act or of the EU law in question.

¹⁴⁵ The TDC/CNC has historically been very critical of the dual licensing system (see, inter alia, *TDC Report on mergers C95/06 MIQUEL ALIMENTACIÓN/PUNTOCASH* and CNC (2009), *Recommendations to public authorities for more efficient and pro-competitive market regulation*).

The CNC has criticized this reform on several occasions and it has advocated removing regional rules that allow these authorisations not based on the criteria of necessity and proportionality required by the Services Directive. The CNC has specifically stressed that the new regulation actually allows the continuance of the previous dual licensing system for the establishment of large retail complexes, considering that:

“...the option chosen may imply that a not insignificant number of Autonomous Communities, if not all of them, may choose to establish these authorisation schemes, using inappropriate grounds to justify the existence of the authorisation, or smuggling in criteria of economic evaluation in the very scope of application of the authorisation scheme... which cause disproportionate harm to free enterprise in relation to the public interest they seek to protect”.¹⁴⁶

4.1.

Analysis of the barriers¹⁴⁷ of Department Stores (DSs)

4.1.1. Rules on access to the activity. Survival of dual licensing

In general, as anticipated, the reform of the LCM has not significantly modified the previous situation, and in most regional legal systems there survives the requirement of enabling titles (licences, authorisations) for opening and operating large commercial establishments. On occasion these authorisations have been replaced with requirements that binding reports be issued by the competent regional departments before the municipal authorisation can be granted, with effects that are in fact equivalent to those of the previous licences.

These regional regulations erect a powerful barrier to entry and operation of department stores, because they reduce the potential competition by limiting the number of possible competitors, and they reinforce the market power of the incumbent operators, even maintaining monopolies in certain local markets. Those regulations also introduce distortions in the strategies for organising the operators' commercial offering, favouring a market structure quite distant from what would be optimal in terms of efficiency, with the consequent harm to consumer welfare in the form of higher prices and poorer quality services than what would prevail in a more competitive environment.

With some exceptions, regional authorities consider an establishment is a large retail outlet (department store or DS) if it has a floor area of 2,500m² or more. And the criterion is even more restrictive in some Autonomous Communities, where that threshold is fixed at 800, 700, 500 or even 200 m². The CNC has on several occasions pointed out the absurdity of such disparity of

¹⁴⁶ CNC (2009), IPN 09/2009 Reform of the Retail Sector Act.

¹⁴⁷ See the Competition Advocacy Working Group (2011), Document of Conclusions on the questionnaire regarding the Impact of Regional Regulations on conditions for opening commercial establishments.

definitions, given that all of them are ostensibly referring to the same type of activity, which is independent of the location where it is carried on.¹⁴⁸

Regional regulations frequently seek to justify this administrative intervention in the opening of large retail establishments on the basis of criteria such as the territorial integration of the establishment in town planning instruments, its environmental impact at the location, ease of consumer access to those establishments, the impact on historical and artistic heritage etc. In general, the criteria used do not include economic ones, with most licensing schemes having done away with economic tests, although their survival, more or less covert, can be detected in certain cases.

Examples that can be cited along these lines include:

- Controls based on the establishment's supplyside impact in the retail market, tied to the use of criteria such as maintenance or expansion of retail areas already present in the city, integration into the urban retail sector or the measure to which the establishment facilitates integration in its premises of small and medium retailing initiatives.
- An assessment of the new outlet's impact on the supply of different services to consumers, or on the square metres of sales space per inhabitant.
- An assessment of its impact on employment or on gross value added in the region. Some Autonomous Communities make grant of the licence conditional on the creation or non-destruction of jobs in the local community, the adoption of measures or commitments to bolster employment stability or hiring under permanent contracts, or the implications for working conditions.


In this regard, it must be recalled that it is untenable to base authorisations for the opening of large establishments on economic tests, whether explicit or concealed, as this is expressly prohibited by the Services Directive, by its transposition into the Spanish law (Umbrella Law) and by the reform of the LCM. The CNC believes that making those authorisations conditional on such criteria

*"entails very serious interference in the free market principle, because it is precisely in the free play of supply and demand in the market that the issue of adequate commercial infrastructure should be decided, as the result of consumers expressing their preferences in this regard".*¹⁴⁹

Also, some of the elements incorporated into the regional regulatory criteria for granting these authorisations may also enter into direct conflict with the specifications of the Services Directive —because they employ a loose interpretation of the reasons of public interest contemplated in the Directive, with the consequent breach of the requirements of Directive article 10 on justification of the necessity, proportionality, non-discrimination, objectivity, publicity

¹⁴⁸ TDC (2003), *Report on the conditions of competition in the retail sector* (I 100/02).

¹⁴⁹ CNC (2009), *Reforming the Retail Sector Regulatory Act in the context of the transposition of the Services Directive*.



It must be recalled that it is untenable to base authorisations for the opening of large establishments on economic tests, whether explicit or concealed.

and transparency of the measure— as well as of the Umbrella Law and of the reform of the LCM. This is the case, for example, when the licensing decision considers aspects for which no justification is given that the restrictions they entail are necessary or proportionate for achieving the public interest objectives, such as the effect of the commercial project in question on consumer spending, on the leisure trade, consumer protection or the reconciliation of family and work life.

In addition, the lack of definition and excessive ambiguity that often taint the criteria used can generate uncertainty and give too much discretion to the authority responsible for applying them, even to the point of undermining the principle of legal certainty. The number and diversity of public interest objectives which, according to the laws of many regions, are pursued with these authorisation requirements also contributes to making the processing of the licensing applications by the competent authorities unnecessarily complex and potentially ineffective. Evaluating a planned store opening's impact on its surrounding environment, or on the historical-artistic heritage, or assessing its consistency with town planning and land use policy, require expertise that the competent authorities for retail commerce do not generally have. As a result, the process requires input and participation from the competent administrative authorities for each of those areas, thus increasing the risk of introducing new obstacles for the project, or of inconsistency between the competent authority (for the retail sector) and the questions on which they must decide (town planning, environment...).

Breach of the requirements of necessity and proportionality is seen more clearly in the frequent cases in which both the regional and municipal authorities who participate in the licensing process justify their respective involvement on the basis of pursuing the same public interest objectives, such that the store opening in question is evaluated from the same standpoint (town planning, environmental impact, accessibility for citizens, etc.) by each of them. In this regard, it should be taken into account that the dual licensing requirement (municipal and regional) for department stores remains in place in most Autonomous Communities,¹⁵⁰ which multiplies the risk of redundancy and the administrative burdens associated with these authorisations, as well as their restrictive impact on competition.

Hence the need to once again assert the importance of eliminating from the prevailing regulations the powers attributed to regional authorities to require commercial licences for establishing and operating large retail facilities. Achievement of the public interest objectives that are formally used to justify those requirements are already adequately guaranteed by the specific regulations on protection of the environment, historical and artistic heritage and town planning policies, without the need to resort to specific authorisations schemes that discriminate against commercial activity in relation to other activities.

¹⁵⁰ A more exhaustive analysis of regional legislation on commerce is given in Annex I. Regional Commercial Regulations.

4.1.2. Other regulatory elements that condition the establishment of retail establishments

Apart from the authorisations analysed above, regional regulations include other instruments that have a decisive bearing on the possibility of establishing commercial facilities. These include:

- Those relating to land use planning for retail activities, specifically, the planning and zoning rules and instruments that apply to this sector.
- The inclusion in town plans of reserves of land for commercial use.

Land use planning of trading establishments in an Autonomous Community is usually done on the basis of retail sector plans (called action plans, sector guidelines, etc.). Regional laws normally condition grant of the authorisation for department stores to the fulfilment of the criteria set out in the retail sector plans, some of which are still pending approval. Those plans may include all types of barriers to entry and expansion of retailers, for example, in the form of:

- The introduction of restrictions on the establishment of new retail outlets, making it conditional, for example, on integration into the consolidated urban landscape or on the number of inhabitants in the town.
- The establishment of specific administrative control systems or a pre-notification requirement for changes of activity, remodelling, changes of ownership, etc.
- The requirement to comply with new obligations for authorising the opening, such as the presentation of specific mobility plans that envisage links to the public transport system, or the preparation of feasibility studies, etc.
- The mention, more or less concealed, of the need to maintain and develop traditional retail, or of a balanced mix of retail formats, or allusion to other economic criteria.

The rules governing the treatment of commercial activity in town planning instruments can also be an important source of regulatory barriers to the extent that they include requirements that involve constraints on competition that do not meet the test of necessity, proportionality and least distortion. In this connection it must be recalled that municipal authorisations, which are generally aimed at checking the establishment's compliance with town planning and environmental rules, must also be adapted to the principles of the Services Directive, the Umbrella Law and the reform of the LCM. Although the Services Directive itself¹⁵¹ regards the establishment of a hypermarket as an example in which requiring an individual authorisation may be objectively justified, this does not exempt the local authorities from having to justify the necessity and proportionality of implementing an authorisation scheme.

¹⁵¹ Whereas 47.

Lastly, in relation to urban planning and reserves of land use, some regions provide that the competent Department for these matters in the regional government must issue a report on the inclusion in the town plan of reserves of land for commercial use in general and, most especially, when those reserves allow or contemplate the establishment of large retail outlets. This obligation represents a major barrier to competition to the extent that the reports are prescriptive and binding, and the criteria that can support a report which is not favourable to the granting of the licence are not clearly defined.

In summary, given the persistence of multiple rules and regulations which may include unjustified barriers to the establishment of commercial activity, a new call is made to all Public Administrations to carry out a proper and adequate transposition of the Services Directive, respecting precise fulfilment of the conditions of necessity, proportionality and least distortion in all regulations capable of restricting the freedom of establishment and limiting competition. It is likewise recalled here that the *Judgment of the European Court of Justice (second chamber) of 24 March 2011 —European Commission/Kingdom of Spain, case C 400/08—* declared illegal provisions of the Spanish national and regional commercial regulations that entailed infringements of article 43 of the Spanish Constitution in relation to the freedom of establishment.

4.1.3. Other forms of administrative intervention that constrain competition in retailing

There are three such forms of administrative intervention that are considered important: the regulation of business hours and of Sunday and holiday store openings; the restrictions on sales calendars and the prohibition of loss leading.¹⁵²

In all three cases, the restrictions of competition spawned by the current regulations have an asymmetric effect on the various retail formats, and were introduced into retail laws, once again, with the stated aim of protecting small traditional merchants.¹⁵³ The large establishments base their comparative advantage on the attainment of economies of scale, which allow them to be more price competitive, so they are especially affected by restrictions on selling at a loss and on the sales calendars. Also, their location, generally outside the downtown areas of cities, means that restrictions on opening hours and on holiday openings make them lose some of their attraction for shoppers, who need more time to reach the large stores where they go to make previously planned purchases. Conversely, those restrictions benefit other formats whose comparative advantage is mainly based on their proximity to consumers.

¹⁵² Although the analysis concentrates on these three aspects of the regulatory framework, because they remain in force, in recent decades there have been other regulatory elements at the regional level, primarily focused on control of the retail offering, such as, moratoria on the establishment of department stores or specific licences for discount formats. At present some regions have a specific tax for large outlets the amount of which is determined by floor area.

¹⁵³ The principal aim of the retailing regulation in force until the reform of the LCM enacted with Act 1/2010 of 1 March 2010 was to defend small retail outlets. This goal was not achieved in the fifteen years during which that previous regulation was in effect, and the so-called traditional retailers have continued losing market share in volume and sales floor area in relation to the medium and large formats (primarily supermarkets).

4.1.3.1. Retailing hours and openings on Sundays and holidays¹⁵⁴

At present, Act 1/2004 of 21 December 2004 on Commercial Hours (Ley de Horarios Comerciales; hereinafter LHC), set a floor of 72 hours per week and eight Sundays and holidays per year, that is, the regional governments can allow more but not less than those lower limits. The Act provides for complete freedom for special establishments included in zones which the regional governments define as having major tourist flows, and for those with sales area of less than 300 m². The Autonomous Communities may modify and limit these special rules, but not make them more restrictive for establishments with less than 150 m².

According to the LHC, in determining the minimum Sundays and holidays, the regional authorities must give priority consideration to the commercial appeal of those days for consumers, that is, the holidays selected must be considered “quality” commercial days. The lawmaker’s goal of protecting traditional retailers is clear in this law in the express exclusion from the special rules for stores which, though having less than 300 m², belong to retail companies or groups that do not qualify as small or medium enterprises, or which operate under the same trade name as those groups or companies.

A great majority of regional governments¹⁵⁵ have applied the minimums set in the Law and stipulate 72 weekly hours and eight Sunday and holiday openings per year for non-special establishments with more than 150m². The interpretation of what is considered a *zone with major tourist flows*, and therefore free from limits on hours, depends on the regional authorities and some take a very restrictive approach to this. Also, the procedures for choosing the holiday openings, generally through committees with representatives from different players in the sector such as trade unions and associations of traditional stores, does not ensure that all Sundays and holidays selected will be quality commercial days as required by the Act. It is also seen that small retailers frequently do not take advantage of the competitive advantage inherent in their greater freedom of business hours compared with the large establishments, which renders this unjustified regulation ineffective as well.

Both the CNC and the former Competition Tribunal (TDC) have come out on several occasions in favour of complete deregulation of store hours, arguing that full freedom in this respect is desirable because it widens choice for citizens and hence improves their welfare. To the extent that freedom of hours increases the consumer’s purchasing opportunities, it may be considered convenient *per se*, even though it does not in principle necessarily lead to a

¹⁵⁴ In Spain the high point in the liberalisation of retail distribution in this sense came with Royal Decree Law 2/1985 which completely deregulated commercial hours. In its 1995 report “Competition in Spain: Appraisal and New Proposals”, the TDC took a very positive view of the regulatory framework after that Royal Decree Law, regarding it as “...one of the drivers for the sector’s development”.

¹⁵⁵ With the exception for 2011 of Madrid (22 Sunday and holiday openings per year), Ceuta (12), Murcia (10) and Canary Islands (9).

reduction in prices.¹⁵⁶ In any event, freedom of hours would give businesses a new element on which they can compete with each other, thereby favouring more effective competition, and would reduce the possibilities of coordination between retailers, with the consequent positive effects on productivity, employment and on prices as well.¹⁵⁷

4.1.3.2. Sales calendars

Chapter II of the LCM regulates the concept and quality of discount-sale products. It also provides that discount sales may only take place during two seasons per year; one at the start of the year and the other during the summer months. Each period will have a minimum duration of one week and maximum of two months, with the specific dates to be fixed by the regional governments.

This limitation on discount sales seasons constitutes an unjustified restriction on competition, introduced, once again, to favour certain retail formats without giving rise to any advantage for consumers. The CNC has in the past already advocated eliminating the restriction of discount sales to particular periods, arguing that:

*“Merchants are not allowed to freely choose the initial date for their discounted sales periods. Nor can they decide the length of those periods. For the CNC, this represents a constraint on the retailer’s behaviour, to the detriment of supplyside variety and diversity, because it introduces an additional element of coordination amongst operators. The CNC holds the view that, although the new law should maintain the general requirements that must be complied with by retailers during seasonal sales, the decision as to the dates and length of those periods should be left to the discretion of each merchant”.*¹⁵⁸

4.1.3.3. Prohibition on loss leading

Selling goods at a loss is regulated by the Retail LCM and by the Unfair Competition Act (LCD). According to article 14.1 of the LCM, it is illegal to offer or sell goods to the public at a loss, except where done by someone for the purpose of matching prices of one or more competitors with capacity to significantly affect the seller’s sales, where the goods are perishable and close to their limit date or in the case of liquidation sales. And the LCD, in turn, in article 17, provides that selling at below cost or at below the price of acquisition will be considered unfair competition if: it is liable to mislead consumers in relation to the price levels of other products or services in the same establishment, it has the effect of discrediting the image of another

¹⁵⁶ The 2003 TDC Report on the conditions of competition in the retail sector (I 100/02) observed that “...circumstances may even be imagined in which, because the business is obliged to use more expensive production factors (mainly overtime) to increase the number of hours it is open, said freedom may give rise to higher costs (which, depending on the circumstances, may or may not be passed onto in its prices)”.

¹⁵⁷ For an analysis of the effects on employment, productivity and prices in the USA of the restrictions on store hours, see Burda, M. and Weil, P. (2005), *Blue Laws*, mimeo, October.

¹⁵⁸ CNC (2009), *IPN 09/2009 Reform of the Retail Sector Act*.

product or establishment, or it forms part of a strategy aimed at eliminating a competitor or group of competitors from the market.

As already examined in previous sections of the Report, loss leading has certain pro-competitive features that may work to the consumer's benefit. From the standpoint of competition, when loss leading is not accompanied by any of the conditions established in the rules on unfair competition, and does not involve abuse of dominant position, it represents an advantage for consumers by allowing them to acquire the product on better terms. That is why prohibiting loss leading as the LCM represents an unjustified restriction on competition. Article 14 of the law regulating the retail sector should therefore be eliminated, leaving this practice subject only to the provisions of competition and unfair competition laws.

4.2.

Effects of the barriers

There exists an extensive economic literature which has analysed the impact of retailing regulatory barriers on diverse macroeconomic variables. In OECD countries, restrictions on opening hours and the excessive authorisations and regulations on access to this activity have hindered the development of higher value added formats capable of creating more jobs, and limited the variety of goods available to consumers.¹⁵⁹ The available empirical evidence and studies carried out on the question in other countries corroborate these conclusions and suggest that regulating access by imposing special requirements for obtaining licences or other type of restrictive regulations weaken the competitive pressure in the industry as well as its dynamism, leading to lower IT spending,¹⁶⁰ less productivity,¹⁶¹ slower employment growth¹⁶² and higher prices for the consumer. Specifically, far from achieving the objective of boosting employment that is frequently invoked to justify them, the restrictions placed on the establishment of large stores limit specialisation within the retail sector and its capacity to modernise, thus curbing the opening of labour-intensive establishments and the positive spillover effects they usually have on traditional stores located near large retail outlets.

In Spain, these effects are aggravated by the restrictive nature and disparity of the regional laws that regulate this sector. The OECD and the IMF and the European Commission have all issued numerous warnings of the harm caused by such regulation and have advocated an ambitious transposition of the Services Directive by all of the competent authorities for these matters in our country. Some studies argue that, in the developed world, Spain is one of the countries worst placed in the global ranking of regulatory restriction.¹⁶³

¹⁵⁹ Boylaud, O and Nicoletti, G. (2001), *Regulatory reform in retail distribution*, OECD Economic Studies No. 32, 2001/I.

¹⁶⁰ Schirvardi, F. and Viviano, E. (2008), "Entry Barriers in Retail Trade", working document of the Centre for Economic Policy Research (CEPR).

¹⁶¹ Haskel, J. and Sadun, R. (2009), "Regulation and UK Retailing Productivity: Evidence from Micro Data", CEPR Discussion Papers.

¹⁶² Bertrand and Kramarz (2002), "Does Entry Regulation Hinder Job Creation? Evidence from the French Retail Industry", National Bureau of Economic Research.

¹⁶³ See the most recent OECD *Economic Surveys* and the latest article 4 consultations of the IMF in relation to Spain.

The current model of retail distribution thus favours a long-term scenario characterised by less product diversity and the predominance of the MB leader – ROB binomial on store shelves.

The empirical studies conducted in this regard on our country appear to bear out that greater regulation of this activity by the regional governments is associated with higher prices,¹⁶⁴ less employment and greater retail density.¹⁶⁵

Spanish regulatory restrictions on retailing have traditionally been biased toward protecting small merchants, with especially large obstacles being placed on access to and exercise of the activity of the largest stores. Consequently, they have been a key driver in the emergence of a retail model in which medium and large supermarkets are predominant and have been expanding their market share ever more to the detriment of the hypermarket format; as pointed out in section 2.2 of this Report, the turning point in the growth of supermarkets relative to growth of hypermarkets was the approval of the LCM.

Developing a retailing model characterised by the predominance of medium and large supermarkets can have negative consequences in terms of product variety and innovation in the long term. A comparatively lower presence of hypermarket tends to reduce the available shelf space, which pushes the price of access to store shelves higher, reduces retailer incentives to carry slower-moving brands, and increases the likelihood that retailers will drop secondary brands and replace them with private labels, where their margins are normally bigger. The current model of retail distribution thus favours a long-term scenario characterised by less product diversity and the predominance of the MB leader – ROB binomial on store shelves.

Having less shelf space available also brings a lower pace of innovation, because the opportunity cost of putting new products on store shelves increases, with the consequent damper on new product launchings. Costlier access to store shelves also reduces the return on new products, meaning manufacturers assume a larger risk with their innovations. The curb on innovation hits manufacturer brands particularly hard, as they see their competitive advantage over retail brands weakened, thus limiting their possibilities of competing with those private labels.

Furthermore, the empirical evidence undercuts the argument that has traditionally been used to try to justify this interventionist regulation: the protection of small merchants and specialised stores. The available data indicate that neither the LCM nor the multiple regional regulations of this activity that have sought to favour small retailers have been able to stem their loss of relative market share in retailing. What is more, the supermarket format, which has been the great beneficiary of Spanish retailing regulation and whose predominance has characterised the evolution of this sector in Spain, is a much closer and potentially more harmful competitor for small stores and specialised shops than other formats, because their mix of diversity of products and

164 Hoffmaister, A. W. (2006), “Barriers to Retail Competition and Prices: Evidence from Spain”. IMF Working Papers, pgs. 1-41.

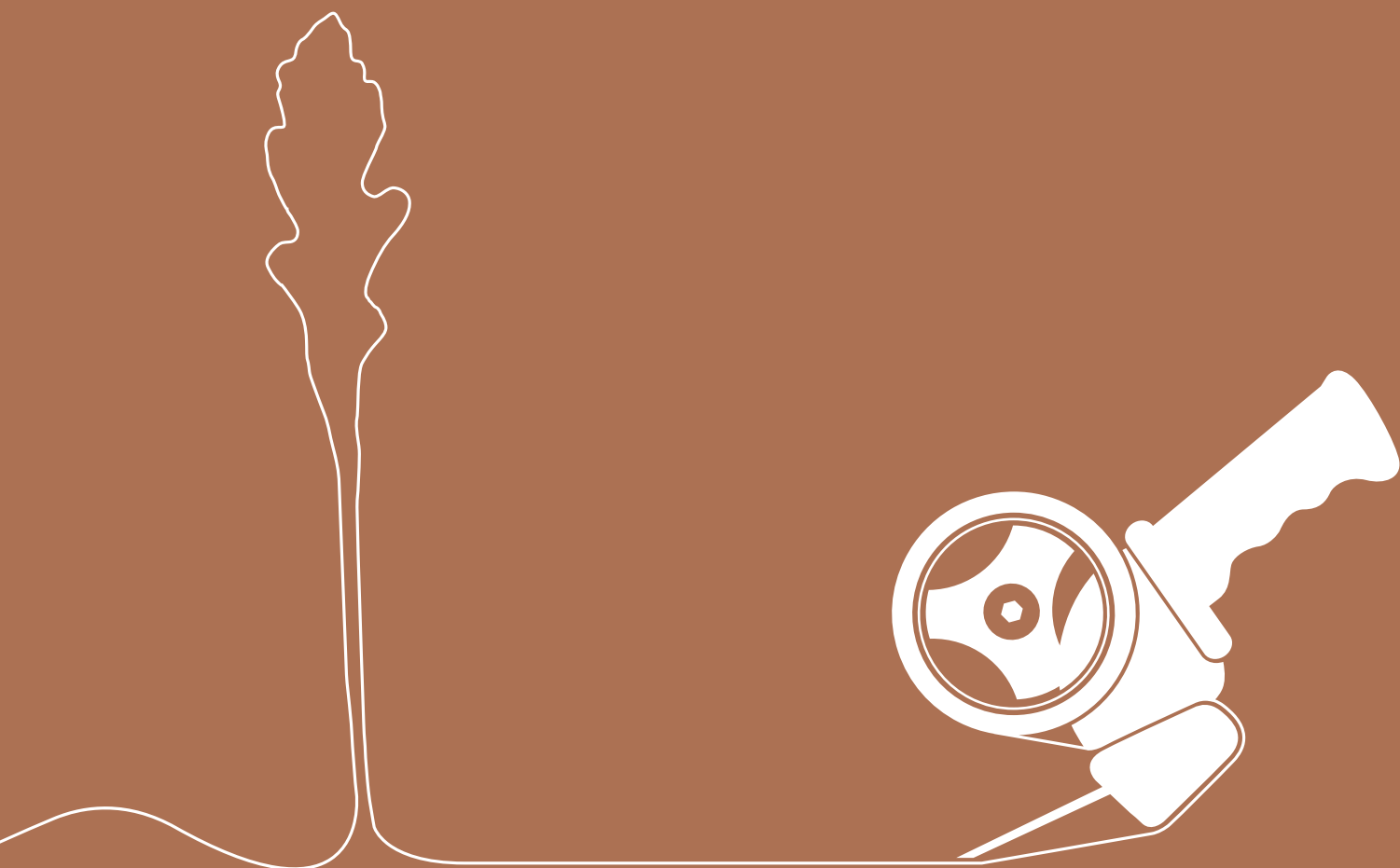
165 De los Llanos Matea, M^a and Mora, J. (2009), “La evolución de la regulación del comercio minorista en España y sus implicaciones macroeconómicas” (The evolution of retailing regulation in Spain and its macroeconomic implications), working document of the Bank of Spain. Retail density refers to the number of retail establishments per inhabitant. There is a positive correlation between regulations that restrict retailing and retail density, with the exception of hypermarkets, for which decreasing the degree of regulate correlates with a larger number of hypermarkets per inhabitant.

proximity to customers has proven particularly attractive to shoppers. The growth of medium size stores in urban downtown areas, spurred in part by the restrictions on the establishment of department stores in the suburban areas, has also favoured a model based on less shopping mobility for consumers, greatly reducing the geographical reach of the appeal of specialised shops for buyers.

In summary, the persistence of important restrictions in national and regional laws on the establishment and operation of large retail outlets has shaped a retailing model that limits intrabrand competition, and has provided a context that is particularly well suited for the intensification of other economic and strategic barriers identified in preceding chapters of this Report that also contribute to strengthening the bargaining power of retailers.

5.

Conclusions



In recent decades the grocery retailing sector has undergone a sweeping change from a model based on traditional outlets to another one where supermarket and hypermarket chains owned by major corporate groups predominate.

As in other countries, in Spain this transformation has been accompanied by a **notable increase in the bargaining power of retailers vis-à-vis their suppliers**, as a result of diverse factors, notably including greater concentration in the sector and higher penetration of retailer brands. The analysis carried out in this Report has nonetheless identified certain specific features in the case of Spain that differentiate it from other European countries:

- First, **concentration has increased** significantly in both the grocery supply wholesale market and grocery retailing market. At the national level, the combined market share of the four top operators went from 48.7% in 2002 to nearly 60% in 2009. This increase has also been accompanied by increasing concentration at the regional level, which strengthens the role of retailers as “gatekeepers” needed by suppliers to reach the end consumers.
- Second, the approval of the Spanish law regulating the retail trade in 1996 (the LCM) generated a turning point in the trend of retail formats, and since then **hypermarkets have been losing relative weight in favour of medium and large supermarkets**. This trend has favoured the establishment of a retailing model based more on proximity to consumers and less on competition on prices, variety and quality of the products on store shelves, which has in turn contributed to fostering a greater development of private labels by retailers than under a scenario where hypermarkets maintained a larger presence.
- Third, and favoured by the above factors and more recently by the economic crisis, the **market share of retailer own brands (ROBs) has grown steadily**, rising from 22% in 2003 to 34% in 2009. Save for a few exceptions, this increase has taken place across practically all product categories. The main drivers for the growing importance of retailer brands include: increased concentration, changes in shopping habits, the development of the discount format, the aforesaid rise of the medium and large supermarket format, heightened competition amongst retailers and the goal pursued by retailers of strengthening their bargaining power versus suppliers.

In the short term, higher retailer buyer power can have positive welfare implications, provided competition among retailers is strong enough and that retailers pass onto the end consumer all or part of the discounts wrested from their suppliers as a result of said increased buyer power. The available evidence indicates that recent years have seen brisk competition between retailers in Spain, parallel to the intensification of interbrand competition associated with the advent of retailer private labels. Heightened by the economic crisis, this trend has worked to contain the final prices paid by the end consumer. Nevertheless, there are some signs that this competition may now be easing.

In the long term, the welfare effects of increased bargaining power are more ambiguous.

- *Interbrand competition* could be weakened as the number of suppliers decreases due to the gradual displacement of second and third tier brands by retailer brands. Although introducing a retailer private label into a category may at first expand consumer choice, over time the ROB ends up displacing the slower moving second-tier brands. Since shelf space is limited, in the long term this phenomenon can foreclose the market to certain manufacturers and restrict interbrand competition, as well as reducing product variety and quality. This trend, inasmuch as it may lead to a scenario where a smaller number of manufacturer brand leaders compete with the ROB in different product categories and intrabrand competition is lower, could also favour anti-competitive coordination between MBs and ROBs.
- *Intrabrand competition* may also be reduced, as the heightened buyer power of the major retailers allows them to accumulate competitive advantages that can create economic barriers to entry because they are difficult to match for their actual or potential competitors, and suppliers are forced to recoup the margin lost in making discounts to the retail majors by hiking prices for smaller retailers.
- Although the retailer brand may spur investment and innovation by MB manufacturers to differentiate their products from the private label, in the medium and long term the increased buyer power of the retailers can reduce not just the suppliers' margins, and hence the availability of funds for innovation, but also their incentives to innovate if those suppliers anticipate that retailers will not allow them to capture a sufficient portion of the profits generated by that investment for suppliers and retailers.
- The greater bargaining power achieved by large retailers as a result of the concentration in the sector and of the strong penetration of retailer private labels has also increased their capacity and incentives to regularly apply certain commercial practices to their suppliers that allow them to obtain supply conditions that are beyond the reach of their competitors and, what is more, that favour the development of their retailer brands, hence steadily increasing their market power.

The main conclusion of the analysis is that the net impact of all of these medium and long-term factors depends to a large extent on **how retailers exert their bargaining power and the degree of effective competition that exists in retailing**. The more widespread and larger the abuses by large retailers of those commercial practices, and the lower the level of real competition in the retailing market, the higher the probability that the currently ongoing transformation in the grocery retailing sector will have a harmful impact on competition and on consumer welfare.

Determining the characteristics and the actual incidence of those commercial practices is thus an essential element in analysing the market and in trying to stem the spread of their negative welfare effects. A key aim of this Report has been to obtain data in this regard, all the more necessary when access to this information faces major hurdles. In particular, the differences in bargaining power and the existence of individual situations of economic

dependence of suppliers on large retailers will in the short term discourage the affected suppliers from voicing objections or eventually filing complaints against potentially unlawful abuses.

In Spain, diverse factors increase the risk that greater retailer bargaining power will have a net negative effect on competition and on consumer welfare in the long term. The analysis carried out has found signs that, in addition to ROB growth at the expense of second and third tier brands, in line with what has been seen in other countries, **intradbrand competition may be weakening and the pace of innovation in the grocery sector appears to have slowed in recent years**. Also, the survey conducted in connection with this Report indicates that there are **certain commercial practices** generally and simultaneously used by the large retail chains. All of this, taken together with the persistence of a set of **legal restrictions** on the establishment and operation of certain retailing formats that hinder the development of real competition in this market, reinforce that risk.

Within the practices widely used in Spain, according to the consultations carried on by the CNC with manufacturers and retailers, the ones that entail the greatest anti-competitive risks are: commercial payments, the failure to set contract terms and conditions in written form and unplanned retroactive modifications of those conditions without prior agreement, the excessive anticipation with which retailers request information from suppliers on certain product characteristics, most favoured customer clauses and demands that suppliers provide sensitive commercial information on their commercial relations with other retailers.

Commercial payments, generally demanded for listing products, slotting them into store shelves or for carrying on promotional activities, appear to be particularly widespread and involve amounts that are far from negligible. These payments may favour efficiency in distribution to the extent that, for example, they allow the risks of introducing new products to be shared, or efficient allocation of a scarce resource, such as shelf space, to the best bidder, or proper handling of vertical externalities between supplier and retailer in promotional expenses. These efficiencies vanish, however, when, as indicated by the responses received, it is difficult for suppliers to determine or define *a priori* how much they will have to pay, and the service to be received from the retailers in exchange for these payments is not clear. In such circumstances, these payments may readjust margins and produce an inefficient transfer of risks to the suppliers, and can generate an advantage for the retail majors over smaller competitors who cannot obtain those payments. To reduce the overall negative welfare impact of commercial payments, it is considered necessary that the payments be known or predictable at the start of the trading relation or of each stage in that relation, that the service be clearly defined between both parties and that a refund mechanism be envisaged if the consideration for the payments was to be performed after the commercial relationship has ended.

The practice of **not putting contract terms and conditions in written form and making unplanned or retroactive modifications** is also quite widespread and occurs in relation not just with the commercial payments, but with all other variables of the trading relationship. The main negative effects of this practice are excessive transfer of risks onto the suppliers, which makes it

The harm caused by certain commercial practices is heightened in Spain by the persistence of important constraints on competition in retailing in the relevant laws and regulations.

more difficult for them to plan their activities and weakens their incentives to invest in efficiency and in innovation, and a possible distortion of interbrand competition because such effects have a more adverse impact on smaller suppliers. These practices, which may constitute a violation of unfair competition laws in situations of economic dependence, could be stemmed to some extent by greater formalisation of trading relations to determine the concrete circumstances in which such modifications can be made and the appropriate compensation payable to suppliers if such modifications are made, with the compensation being proportionate to the content of the changes.

The **excessive anticipation with which retailers require information from suppliers on their new products** facilitates “copycat” abuses of all kinds. Although the available information appears to indicate that these conducts have a moderate incidence in Spain, the affected suppliers, category leaders for the most part, have emphasised the particularly pernicious effect of this practice on innovation, given that as retailers have a capacity to bring out copycat products rapidly, the excessive anticipation with which information is required sharply increases the risk that the supplier will not be able to obtain an adequate return on its investment. Retailers should have to abide by clear, transparent, proportionate and non-discriminatory rules on the content and, above all, on the advance timing of the information they request of their suppliers.

Most favoured customer clauses and retailer demands that suppliers provide information on their commercial dealings with other retailers may in themselves constitute a violation of competition rules. In the context of a market structure characterised by a high degree of concentration in retailing, growing bargaining power on the part of the big retailers and the existence of important entry barriers, most favoured customer clauses can act as a major strategic restriction on competition, apart from facilitating horizontal coordination among manufacturers. In addition, by reducing the incentives to give discounts and hindering price discrimination, they also reduce effective and potential competition in retailing and thus favour closing off the market to other retailers. Furthermore, requiring suppliers to disclose sensitive commercial information on other retailers is a trading practice that can facilitate coordination between retailers and manufacturers, generating collusive conducts between retail distributors in the form of “hub and spoke” cartels, the emergence of which cannot be discarded given the market structure described here. Although the survey of suppliers indicates these practices are only occasional, the large retailers shall bear in mind that adopting most favoured customer clauses in contractual relations and requiring sensitive information on other retailers may run afoul of competition rules.

There are various initiatives at the European Union, national and regional levels to improve commercial practices all along the food supply chain by modifying the regulations governing the sector or establishing codes of conduct or best practices for the operators involved. The CNC does not consider that evaluating those initiatives is necessary, except for the need to point out that **each of them must respect the goals of maintaining a competitive environment and avoiding the inefficiencies produced by the kind of breakup of market unity** that could be brought about by a proliferation of diverse regulations or codes in different parts of the country. As for codes of conduct amongst operators, in particular, the CNC has already stated in

the past that the existence and effectiveness of such codes may be positive, provided that they do not include anti-competitive provisions, that adherence to the codes is free and voluntary and that they include effective and binding mechanisms for resolving disputes.¹⁶⁶

The harm caused by certain commercial practices is heightened in Spain by the persistence of important **constraints on competition in retailing in the relevant laws and regulations.**

Act 1/2010 of 1 March 2010 reforming the previous law regulating the retail sector, Act 7/1996 of 15 January 1996 (LCM) has maintained the power of regional authorities to implement licensing systems for the establishment of large retail establishments under the grounds of overriding requirements of public interest which might be affected by retail distribution, such as protection of the natural and urban environment, land use planning and conservation of historical and artistic heritage. This has allowed a continuation of the practice seen under the previous law regarding the requirement of a second commercial licence for large retail outlets or other procedures with equivalent effect. What is more, the lack of precision and the vagueness with which those criteria of public interest are often applied in the authorisation procedures, unaccompanied by an explicit demonstration of the necessity, proportionality and least distortion of those procedures in relation to the objective pursued, is not only contrary to the specific terms of the Services Directive, but also introduces an excessive margin of discretion by the competent authorities in applying those provisions. Furthermore, the regional and municipal regulations on urban planning matters, in particular, also include other requirements for granting these authorisations that serve to complement and strengthen the regulatory barriers to entry and expansion that confront large retail establishments.

The discriminatory effects of these regulations against large retail establishments are aggravated by another group of provisions that significantly crimp their capacity to compete, notably including restrictions on their freedom to set store hours and on holiday openings, limitations on discount sale seasons and the blanket prohibition on loss leading. In most Autonomous Communities, business hours and the possibility of opening on Sundays and holidays are limited to the strict minimum limits set out in the national law, that is, a maximum of 72 weekly hours of opening and a ceiling of eight Sunday and holiday openings per year. The regulation of sale seasons is an important restriction on the behaviour of retailers and is detrimental to choice and diversity of supply, and introduces an additional element of coordination between operators. And the prohibition of using loss leaders, even when this does not involve unfair competition or abuse of a dominant position, restricts the competitive possibilities of retailers, for example, by placing constraints on their stock management policies, and prevents consumers from benefiting from lower prices.

All of these regulations tend to reduce intrabrand competition and have been a decisive factor in the emergence in Spain of a retailing model based on the predominance of the large supermarket format, at the expense of the

¹⁶⁶ See CNC (2010), *Report on Competition and the Agrifood Sector*.

hypermarket, with the consequent obstacles to innovation in the manufacturing industry and decrease in interbrand competition. In addition, as the supermarket format is a much closer competitor for small and specialised stores, and potentially more threatening to their survival, the result of all of these laws has been precisely the opposite of their objective they were said to pursue, namely, the protection of traditional retailers.

This regulation has also contributed to creating an environment that is highly conducive to widespread simultaneous application by the retail majors of certain commercial practices that pose risks for interbrand competition and that can close off the market to other retailers. Their effect is in this sense akin to a strategic barrier to entry which, by strengthening the bargaining power of the more powerful incumbent retailers, further fuels the spread of those practices and intensifies their use.

In summary, taking into account the present and future risks posed by these entry barriers, by the current trend seen in the grocery retailing model and the incidence of certain commercial practices for weakening interbrand and intra-brand competition, as well as for innovation and for the efficient functioning of the market, there is a priority need to eliminate regulatory barriers and to monitor and control the abuses seen in those practices, independently of the adoption of specific measures on the practices that are potentially the most harmful to competition and to an efficient functioning market.

Toward that end, the recommendations that follow are made.

6.

Recommendations



One

Eliminate the important constraints on competition in retailing that are spawned by the persistence of regulations which, in many cases, especially at the regional level, are also contrary to the Services Directive. Specifically:

- Remove from the national regulation the authority of regional governments to submit the establishment of retail outlets to a prior authorisation requirement, contained in the LCM (Act 7/1996 of 15 January 1996), in order to avoid the risk that overly loose interpretations of the public interest objectives to which those authorisations are subject will lead to a de facto maintenance of the dual authorisation system.
- Urge regional authorities to make a correct and adequate transposition of the Services Directive, respecting strict compliance with the conditions of necessity, proportionality and least distortion that must be met by any regulation that restricts the freedom of establishment.
- Urge regional and local authorities to respect those principles, particularly in the regulations and policies that govern urban planning matters.
- Completely liberalise store hours and Sunday and holiday openings.
- Eliminate from the LCM (Act 7/1996 of 15 January 1996) the limitation on discount sale periods.
- Eliminate the prohibition on loss leading contained in article 14 of the LCM (Act 7/1996 of 15 January 1996). The instances in which the use of loss leaders can be harmful are already prohibited in the Competition Act and in the Unfair Competition Act, rendering their blanket prohibition in the law regulating the retail sector redundant and inappropriate.

Two

The elimination of regulatory barriers of this kind is a necessary but not sufficient condition for limiting the negative impact that certain commercial practices can have in the present context, characterised by a combination of retailer bargaining power and the emergence of additional economic and strategic barriers spawned by the increase in that power.

To limit that impact, it is recommended that the necessary mechanisms be established to facilitate precise knowledge of the characteristics and level of incidence of those retailing commercial practices that can have a negative effect on competition and efficient functioning of the market. Specifically:

- Implement mechanisms that facilitate the possibility of reporting those practices to the competent authorities, with minimal risk of reprisals against the complainant. Manufacturers' associations may play an active role in denouncing practices of this kind, as provided in article 33.2 of Act 3/1991 on Unfair Competition.
- Require large retailers to compile and conserve the relevant information identified in this report on each of the commercial practices cited as problematic, so that those practices can be monitored and assessed.
- Establish instruments of periodic consultation to obtain information from suppliers on the prevalence of the problematic commercial practices.

Three

The contractual conditions that govern the trading relationship should be formalised in written form. Although this represents a limitation on the contract law principle of freedom of form in Spain, this measure would allow more effective prevention of instances of abuse by the party with greater bargaining power. Such abuse is difficult to combat if it is impossible to know the specific terms and conditions of the trading arrangements. This requirement would not entail an excessive burden for any of the parties when it comes to formalising their relations.

Four

Implement mechanisms that minimise the negative impact on efficiency and on consumer welfare of the commercial practices identified as problematic in the Report. Specifically:

- The **commercial payments** made by suppliers to retailers should be known or predictable for suppliers at the start of the commercial relationship. Also, the service to be received by the supplier for the payments should be indicated expressly and specifically, even if it cannot be individualised, so that compensation can be made in the event of termination of the contractual relationship.
- **Retroactive modifications**, changes or revisions of the contract terms and conditions, save in *force majeure* events, should be limited to the circumstances provided for in the contracts and be proportionate to those circumstances, and, inasmuch as possible, upper and lower limits should be set for such changes. In addition, the contracts should provide mechanisms for adequate compensation in the event these contingencies arise.

- The **information required by a retailer from a manufacturer** on a specific product should be limited to what is justified in the context of the retailer-manufacturer relation. And the time period from when the information is provided and the product in question is launched should, in turn, also be proportionate and have an objective justification.
- The larger retailers must be aware that asking their suppliers for **sensitive commercial information** on other retailers and, in particular, for documents that allow the retailer to verify said commercial information, is very likely to give rise to a violation of competition rules, given the market structure analysed in the Report, which is characterised by a high degree of concentration and by the existence of important entry barriers.
- The major retailers should take into account that **most favoured customer clauses**, if their use is widespread, reduce the intensity of competition between retailers, as they facilitate quick alignment of retail prices, serve as a deterrent to other retailing models and thus represent a barrier to entry by new retailers. Those clauses may also imply the transfer of commercially sensitive information and propitiate coordination between suppliers or retailers, with the consequent anti-competitive effects described above. All of this is without prejudice to the need for a competition analysis to be carried out on these clauses, having regard to the concrete circumstances of each case and without prejudice to the possibility of defending efficiencies that is provided for in article 1.3 of the LDC and article 101.3 of the Treaty on the Functioning of the European Union.

Five

The CNC believes that implementing the above recommendations would favour a competitive and efficient environment that can maximise consumer welfare, but is aware of the existence of numerous initiatives to improve commercial practices all along the food supply chain. In this regard, a priority concern is to **avoid the proliferation of different regulatory regimes or codes of conduct for commercial practices between suppliers and retailers at a regional level throughout the country**. All public administrations are therefore urged, along with the relevant sector associations in relation to their role in drawing up such codes of conduct, to take these recommendations and competition criteria into account in all initiatives of any kind that they decide to pursue in relation to those practices.

Bibliography

Alimarket (2010), *Especial MDD: Columna vertebral del lineal* (Special on ROB: backbone of shelf space), April.

Alimarket (several years), *Monográficos de Distribución Comercial*, March, period 2004-2011.

Australian Competition and Consumer Commission, (2008), "The role of private label products", in *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*.

Autoridade da Concorrência (2010), *Relatório Final sobre Relações Comerciais entre a Distribuição Alimentar e os seus Fornecedores*.

Autoridade da Concorrência (2011), *Relações Comerciais entre a Grande Distribuição Agro-Alimentar e os seus Fornecedores*;

Autorité de la Concurrence (2010), *Avis n° 10-A-25 relatif aux contrats de «management catégoriel» entre les opérateurs de la grande distribution à dominante alimentaire et certains de leurs fournisseurs*.

Baker J. (1996), "Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses", *Antitrust Law Journal*, vol. 64, pgs. 517-34.

Bergès-Sennou F., Bontemps P and Réquillart V. (2004), "Economics of Private Labels: A Survey of Literature", *Journal of Agricultural & Food Industrial Organization*, Vol 2.

Bertrand, M. and Kramarz, F. (2002), "Does Entry Regulation Hinder Job Creation? Evidence from the French Retail Industry", National Bureau of Economic Research.

Bontemps, C., Orozco, V. and Réquillart, V. (2008), "Private Labels, National Brands and Food Prices", working document of the *Institut d'Économie Industrielle* of Toulouse.

Boylaud, O and Nicoletti, G. (2001), *Regulatory reform in retail distribution*, OECD Economic Studies No. 32, 2001/I.

Burda, M. and Weil, P. (2005), "Blue Laws", mimeo, October.

Chintagunta, P. K., A. Bonfrer and I. Song (2002). "Investigating the effects of store brand introduction on retailer demand and pricing behavior", *Management Science*, 48, pgs. 1242-1267.

CNC (2008) *Recommendations to public authorities for more efficient and pro-competitive market regulation*.

CNC (2009), *IPN 09/2009 reform of the Retail Sector Act*.

CNC (2009), *Reforming the Retail Sector Regulatory Act in the context of the transposition of the Services Directive*.

CNC (2010), *Report on Competition and the Agrifood Sector*.

European Commission (2009), "Competition in the food supply chain", accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — *A better functioning food supply chain in Europe*, Brussels.

European Commission (2009), *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (2009/C 45/02), paragraphs 28 et seq.

European Commission (2010), *Guidelines on Vertical Restraints*.

European Commission, DG Enterprise and Industry (2011), *The impact of private labels on the competitiveness of the European food supply chain*, study prepared for the Directorate General for Enterprise and Industry by LEI (research centre at Wageningen University).

Competition Bureau (2002), *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) as Applied to the Canadian Grocery Sector*.

Competition Commission (2000), *Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom*.

Competition Commission (2007), "Working Paper on Buyer Power", prepared for the report *The supply of groceries in the UK market investigation*.

Competition Commission (2007), "Working paper on the competitive effects of own-label goods", prepared for the report *The supply of groceries in the UK market investigation*.

Competition Commission (2008), *The supply of groceries in the UK market investigation*.

Cruz Roche, I. (1999), "El proceso de negociación en el canal de distribución" (The negotiating process in the distribution channel), in *Los canales de distribución de productos de gran consumo. Concentración y competencia*. Ediciones Pirámide.

Cruz, I. and Oubiña, J. (2006), "Estructura de competencia y dispersión de precios en el comercio minorista" (Structure of Competition and Price Dispersion in Retailing), *Revista de Economía de Información Comercial Española*, Nº 828.

De los Llanos Matea, M. and Mora, J. (2009), "La evolución de la regulación del comercio minorista en España y sus implicaciones macroeconómicas" (The evolution of retailing regulation in Spain and its macroeconomic implications), working document of the Bank of Spain.

Dobson, P. (2008), "Buyer-driven vertical restraints", document presented at the conference *Pros and Cons of Vertical Restraints* held in Stockholm in November 2008.

Ezrachi A. (2010), "Unchallenged Market Power? The Tale of Supermarkets, Private labels and Competition Law", *The University of Oxford Centre for Competition Law and Policy Working Paper CCLP (L) 27*.

Federación Agroalimentaria de la Unión General de Trabajadores (UGT) (2010), *Análisis de las condiciones laborales de las empresas agroalimentarias de mayor facturación en España* (Agri-food Federation of the General Union of Workers — Analysis of labour conditions in the biggest selling agri-food companies in Spain).

Federal Trade Commission (2001), *Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry*.

Federal Trade Commission (2003), *Slotting allowances in the retail grocery industry*.

Fernández, A. (2010), "La situación actual de las marcas de distribuidor desde la perspectiva de los fabricantes: un estudio cualitativo" (The current situation of private labels from the standpoint of manufacturers: a qualitative study), *Distribución y Consumo*, September-October 2010, pgs. 24-35.

Fernández, P., Albert, R., and Puelles, J. A. (1997), "Marcas de distribuidor: Especial referencia al precio" (Retailer brands: Special price reference), *Distribución y Consumo*, Nº 33.

Gázquez, J. C. and Sánchez, M. (2007), "Análisis de la estructura competitiva entre marcas nacionales y marcas privadas: un análisis empírico con datos de escáner" (Analysis of competitive structure between national brands and private label brands: an empirical analysis with scanner data), *Revista de Economía de Información Comercial Española*, Nº 839.

Competition Advocacy Working Group (2011), *Documento de Conclusiones sobre el cuestionario en relación con el Impacto de la Normativa Autonómica sobre las condiciones de apertura de Establecimientos comerciales* (Document of Conclusions on the questionnaire regarding the Impact of Regional Regulations on conditions for opening commercial establishments).

Haskel, J. E. and Sadun, R. (2009), "Regulation and UK Retailing Productivity: Evidence from Micro Data", CEPR Discussion Papers.

Hoch, S. J. and Banerji, S. (1993), "When do private labels succeed?", *Sloan Management Review*, Summer, V. 34, num. 4.

Hoffmaister, A. W. (2006), "Barriers to Retail Competition and Prices: Evidence from Spain". IMF Working Papers, pp. 1-41, 2006.

Huguet, C. (1997), "El category management o la ley del consumidor" (*Category management or the law of the consumer*), Harvard-Deusto, *Marketing & Ventas*, July-August.

Inderst, R. and Mazzarotto, N. (2007), "Buyer power in distribution", chapter for the *ABA Antitrust Section Handbook: Issues in competition law and policy*.

INSEE (2010), *La situation du commerce en 2009*.

International Markets Bureau (2010), *Global private label trends, market analysis report*, Canada.

Kemplerer, P. (2005), *Bidding Markets*, document prepared for the Competition Commission.

Kovacic, W. et al (2006), "Bidding Rings and the Design of Anti-Collusion Measures for Auctions and Procurements", *Handbook of Procurement*, Cambridge University Press, pp. 381-411.

Kumar, N. and Steenkamp, E.M. (2007), *Private label strategy*, Harvard Business School Press.

London Economics (1997), *Competition in Retailing*, study prepared for the OFT.

MARM (2009), *Monográfico de Marcas de Distribuidor (Monograph of Retailer Brands)*, prepared by the Observatory of Consumer Habits and Grocery Distribution.

MARM (2011), *Monográfico de Monográficos (Monograph of Monographs)*, study prepared by the MARM Observatory of Consumer Habits and Grocery Distribution, March.

Mercasa (2010), *Alimentación en España 2010 (Food in Spain 2010)*.

MITYC (2007), *Boletín de Información Comercial Española*, June.

MITYC (2011), *Boletín de Información Comercial Española*, August.

Morris, D. and Nightingale, J. (1980), "Why should firms manufacture retailer Brands", *Managerial and Decision Economics*, Vol. 1, Nº3.

Motta M. (2004), *Competition Policy: Theory and Practice*, Cambridge University Press.

OECD (1998), *Buying Power of Multiproduct Retailers*, Policy Roundtables Document.

OECD (2008), *Monopsony and Buyer Power*, Policy Roundtables Document.

OFT (1998), *The Welfare Consequences of the Exercise of Buyer Power*, prepared by Paul Dobson, Michael Waterson and Alex Chu for the OFT.

Oubiña, J. (2002), "ECR o respuesta eficiente al consumidor: El reaprovisionamiento eficiente en la cadena de suministros" (ECR or efficient consumer response: efficient replenishment in the supply chain), *Revista Distribución y Consumo*, Nº 63, pgs. 69-85.

Puelles, J. and Puelles, M. (2003): "Marcas de distribuidor: más de 30 años de un proceso dinámico, competitivo e imparable" (Retailer brands: more than 30 years of a dynamic, competitive and unstoppable process). *Revista Distribución y Consumo*. May-June 2003, pgs. 55-71.

Puelles, J. and Puelles, M. (2008), "Marcas de Distribuidor (MDD): 100 ideas clave. Iniciativas empresariales más novedosas a nivel mundial" (Retailer Brands: 100 key ideas. Most innovative worldwide business initiatives), *Revista Distribución y Consumo*, July-August 2008, pgs. 241-256.

Puelles, J. and Puelles, M. (2009), "Evolución, situación actual y perspectivas de MDD en España" (Evolution, current situation and prospects for ROBs in Spain)", *Revista Distribución y Consumo*, September – October 2009.

Schirvardi, F. and Viviano, E. (2008), "Entry Barriers in Retail Trade", Centre for Economic Policy Research (CEPR).

Sckokai, P. and Soregaroli, C. (2008), "Impact of private label development across retail formats: Evidences from the Italian dairy market", *Review of Agricultural and Environmental Studies*, vol. 87(2), pgs. 27-47.

Semeijn, J., van Riel, A., Ambrosini, A. B. (2004): "Consumer evaluations of store brands: effects of store image and product attributes", *Journal of Retailing and Consumer Services*, 11 (2004) 247-258; 247-258.

Steiner, R. L. (1985), "The nature of vertical restraints", *The Antitrust Bulletin*, Vol. 30.

Steiner, R. L. (2002), "The nature and benefits of National Brand/Private Label Competition", working document presented at the Annual Meeting of the American Economic Association, Georgia.

Tan G. (2001), "The Economic Theory of Vertical Restraints", working paper prepared for the Competition Bureau of Canada.

TDC (1995), *Competition in Spain: Appraisal and New Proposals*.

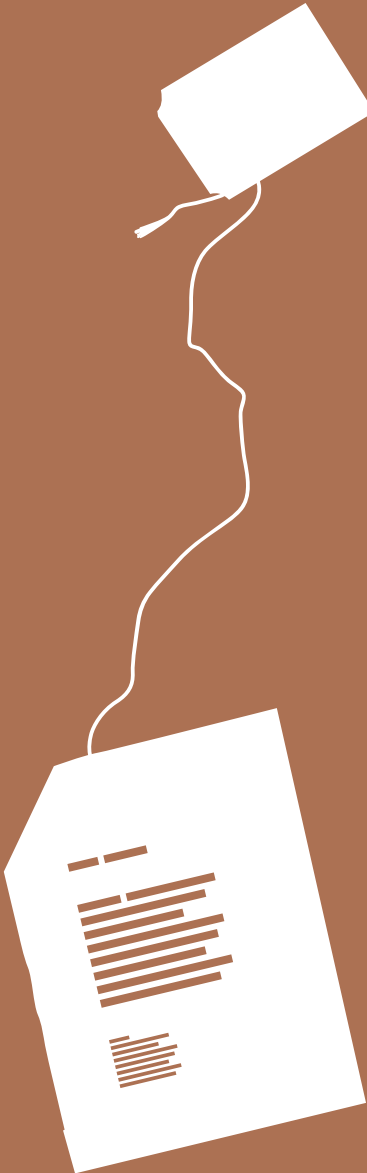
TDC (2003), *Report on the conditions of competition in the retail sector (I 100/02)*.

Galician Competition Tribunal (2007), *La distribución minorista de base alimentaria en Galicia desde la perspectiva de la competencia* (Grocery Retailing in Galicia from the Standpoint of Competition).

Basque Competition Court (2009), *La distribución de bienes de consumo diario: Competencia, oligopolio y colusión tácita* (Retailing of daily consumer goods: Competition, oligopoly and tacit collusion).

Ward, M., Shimshack, J., Perloff, J. and Harris, M. (2002) "Effects of the private-label invasion in food industries", *American Journal of Agricultural Economics* 84(2002): 961-973.

Annex 1



Regional retail regulations

Regions	Commerce laws	Latest modification, adaptation services directive	Definition of department store (ds) or store with supramunicipal impact	Licence or report for authorisation of ds
ANDALUSIA	Law 17/1996 of 10 January 1996 on Internal Commerce of Andalusia.	Law 3/2010 of 21 May 2010 amending diverse Laws to transpose in Andalusia Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.	Individual or collective establishments with useful area of more than 2,500 m ² .	Commercial Report of the Regional Department.
ARAGÓN	Law 9/1989 of 5 October 1989 Regulating Retailing in Aragón.	Decree-Law 1/2010 of 27 April 2010 of the Government of Aragón amending diverse laws of the Autonomous Community of Aragón to transpose Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.	Establishments with floor area of more than 2,500 m ²	Regional licence.
ASTURIAS	Law of the Principality of Asturias 9/2010 of 17 December 2010 on Internal Commerce.		2 types: – Large commercial establishments dedicated to retailing in any sector with floor area of between 2,500m ² and 10,000 m ² . – Shopping centres or commercial complexes with retailers, restaurants and services dedicated to retailing in any sector and with floor area of 10,000m ² or more.	Report on Evaluation of Structural Impact and Report on Evaluation of Environmental Impact issued by the respective Regional Departments. The Sector Guidelines on Commercial Establishments must also be complied with.

Commercial land use planning instruments	Observations	Sundays and holidays (2011)	Specific taxes on dss
Retail establishments plan, framed within the relevant Land Use Plans.	<p>When determining commercial land zoned for DSs, urban planning instruments must take into account criteria such as the preference for urban land, strengthening of downtown areas, links with residential land, contribution to maintenance of commercial areas, integration in urban commercial fabric, etc.</p> <p>The Commercial Report of the Department is binding if the retailing area is provided for in an urban planning instrument that has not been reported on by the Department or has received an unfavourable report.</p> <p>The information the municipal government must submit in order to prepare the regional report on authorisation of the DS must address matters regarding the projected DS's useful floor area, investment and jobs.</p>	8	NO
General Plan for Commercial Establishments of Aragón.	<p>The requirements for granting the licence must be based on overriding requirements relating to the public interest, including, public policy, public security and public health, within the meaning of articles 52 and 62 del Treaty on the Functioning of the European Union, maintenance of social order, social policy objectives, protection of the recipients of the services, consumer protection, protection of workers, including their social protection, prevention of unfair trading, protection of the natural environment and environment, including urban and rural planning, road safety, cultural policy objectives and protection of historical, artistic and cultural heritage.</p> <p>Regulations may be approved defining certain zones as especially vulnerable in which reaching the 2500 m² threshold will not be necessary for being considered a DS.</p> <p>Pending regulatory development and implementation.</p>	8	<p>YES.</p> <p>Law 13/2005 of Aragón of 30 December 2005 on fiscal and administrative measures on matters of devolved taxes and own taxes of the AC of Aragón.</p> <p>Legislative Decree 1/2007 of 18 September 2007.</p>
Sector Guidelines on Commercial Establishments.	<p>The Sector Guidelines consider as one of their specific objectives the safeguarding of historical districts, conserving, maintaining and developing traditional commerce.</p> <p>For DSs general criteria are included for assessing their opening that must be taken into account in all acts and measures that fall within their powers. They include the project's ties to the consolidated urban sector, giving priority to those projects that favour a mix of social uses and strengthening of social cohesion and the economic fabric. Specific criteria for assessing the opening of commercial establishments include considerations of size and location of the outlet in relation to the local population, strengthening territorial equilibrium, communication and transportation systems, and the area's urban suitability for hosting the large retail establishment.</p>	8	<p>YES.</p> <p>Law 15/2002 of the Principality of Asturias of 27 December 2002, accompanying the General Budgets for 2003.</p>

Regions	Commerce laws	Latest modification, adaptation services directive	Definition of department store (ds) or store with supramunicipal impact	Licence or report for authorisation of ds
BALEARIC ISLES	Law 11/2001 of 15 June 2001 Regulating Commercial Activity in the Balearic Islands.	<p>Law 8/2009 of 16 December 2009 reforming Law 11/2001 of 15 June 2001 Regulating Commercial Activity in the Balearic Islands for the transposition of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.</p> <p>Law 12/2010 of 12 November 2010 amending diverse laws to transpose into the Balearic Islands law Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.</p>	<p>Floor area of more than:</p> <ul style="list-style-type: none"> – 700 m² in Mallorca – 400 m² in Menorca and Ibiza – 200 m² in Formentera. <p>For outlets selling motor vehicles, machinery, etc:</p> <ul style="list-style-type: none"> – 2,000m² in Mallorca, – 1,500 m² in Menorca and Ibiza – 400 m² in Formentera. 	Regional licence.
CANARY ISLANDS	Law 4/1994 of 25 April 1994 Regulating Commercial Activity in the Canary Islands.	Law 12/2009 of 16 December 2009 regulating Retail Licences.	<p>3 types of outlets require authorisation by regional government:</p> <ul style="list-style-type: none"> – large establishments: 2,500 m² in Gran Canaria and Tenerife, 1,650 m² in Lanzarote, 1,250 in Fuerteventura, 1,000 in La Palma and 500 in La Gomera and El Hierro. – opening of establishments in which the group exceeds 5,000 m² in Tenerife and Gran Canaria, 3,300 m² in Lanzarote, 2,500 m² in Fuerteventura, 2,000 m² in La Palma and 1,000 m² in La Gomera and El Hierro. – integrated commercial outlets of more than 9,000m² in Gran Canaria and Tenerife, 6,000 m² in Fuerteventura, Lanzarote and La Palma and 3,000 m² in La Gomera and El Hierro. 	Regional retail licence.

Commercial land use planning instruments	Observations	Sundays and holidays (2011)	Specific taxes on dss
Island land use plans through the Sector Master Plans.	<p>One of the requisites for being able to apply for a regional licence is to include measures to enhance employment quality, with special attention to the type of employment contract, and evidence of the commitment to bring hard-to-employ social groups into the job market.</p> <p>The impact on the movement of persons and vehicles of the establishment is assessed for obtaining the licence. Consideration is given to the consistency between the projected outlet and the municipal general planning instrument, necessarily taking into account criteria such as retail density and land use sustainability.</p>	8	NO
Special Territorial Plan for Large Commercial Establishments on each island.	<p>The procedure for granting the regional licence will assess the project's compliance with criteria such as interterritorial and environmental balance and impact on territory, consumer rights and the inclusion in the project of new information technologies.</p> <p>The licensing process is centralised at the regional level. Nevertheless, a report is required from the municipal government on the retail establishment's conformity with the relevant town plans. This includes a pronouncement on issues such as: environmental aspects, saturation of roadways, increased travel, accessibility of parking facilities, adequacy of infrastructure for water, lighting, etc. A report is also required from the Cabildo (municipal government) on the project's conformity to the Island Land Use Plan and other land use planning instruments; and a report from the competent regional department for employment on the project's impact on the quality of employment, social initiatives or effects on hard-to-integrate groups.</p>	9	NO

Regions	Commerce laws	Latest modification, adaptation services directive	Definition of department store (ds) or store with supramunicipal impact	Licence or report for authorisation of ds
CANTABRIA	Cantabria Commerce Law 1/2002 of 26 February 2002.	Cantabria Law 2/2010 of 4 May 2010, to amend Cantabria Commerce Law 1/2002 of 26 February 2002, and other complementary provisions to adapt them to Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.	Establishments with floor area of more than 2,500 m ² . Theme parks, in relation to their retailing activities when the display and retail sale area is larger than 2,500 m ² , or 15% of the total built area.	Report of the competent regional department for commerce, which will be binding if negative, before municipal licence can be issued.
CASTILLA LA MANCHA	Castilla-La Mancha Commerce Law 2/2010 of 13 May 2010.		Establishments with floor area of more than 2,500 m ² .	Mandatory and binding report prior to municipal licence by the Commission on large retail establishments, composed of the competent General Directors for retail, urban affairs, land use planning, livestock droveways, historical-artistic heritage and environmental sustainability.
CASTILLA Y LEÓN	Castilla y León Commerce Law 16/2002 of 19 December 2002.	Decree-Law 3/2009 of 23 December 2009 on Measures to Promote Service Activities in Castilla y León.	Establishments with floor area of more than 2,500 m ² .	Retail license granted by the competent regional department for commerce.
CATALONIA	Legislative Decree 1/1993 of 9 March 1993	Decree-Law 1/2009 of 22 December 2009 regulating retail establishments. Legislative Decree 3/2010 of 5 October 2010 to adapt regulatory instruments with statutory force to Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.	3 types of establishments require licences: – outlets with floor area of more than 2,500 m ² . – outlets outside the consolidated urban sector with floor area of between 800 and 2,500 m ² . – individual singular and collective outlets with more than 5,000 m ² .	Retail licence granted by the competent DG for commerce.

Commercial land use planning instruments	Observations	Sundays and holidays (2011)	Specific taxes on dss
No specific instruments are stipulated.	<p>In issuing its report, the regional department must assess criteria such as:</p> <ul style="list-style-type: none"> –The effects on employment levels and quality. In particular, that it consider the employment of hard-to-integrate groups such as women, youth or the long-term jobless, and that the employment contracts be permanent. –Measures aimed at balancing work and family live and other social initiatives (daycare, fair trade, etc.). –Inclusion of measures relating to consumers and leisure. –That the department store facilitates integration on its premises of initiatives by small and medium size retailers. 	8	NO
No specific instruments are stipulated.	<p>The criteria to be taken into account for issuing the Report are:</p> <ul style="list-style-type: none"> – Proportionality and appropriateness of the commercial establishment to the urban environment, particularly its integration in consolidated urban sectors or in outlying urban development areas, and the intensity of occupation of commercial land in relation to that of residential land. – Conditions of mobility and accessibility, impact on public infrastructure and adequate development of parking facilities. – Environmental respect, energy efficiency, visual and landscape impact with respect to historical-artistic heritage sites. 	8	NO
Submission to the region's land use planning instruments and the mechanisms set out in the relevant urban plans.	<p>The criteria evaluated in the decision to grant the retail licence include:</p> <ul style="list-style-type: none"> – the project's integration in the urban environment. – the project's impact on the environment. – the project's impact on roadways and transit systems. – the project's integration in land use plans. – the project's repercussion on the services received by consumers. 	8	
Urban and land use planning for commerce uses	<p>There are different levels of administrative intervention (notification or retail licence) depending on the size of the establishment and on whether it is inside or outside a consolidated urban sector.</p> <p>The evaluation criteria include location, consistency with urban plans, the mobility generated, environmental impact and landscape integration and impact.</p>	8	<p>YES.</p> <p>Law 16/2000 of Catalonia of 29 December on Tax on Large Retail Establishments.</p>

Regions	Commerce laws	Latest modification, adaptation services directive	Definition of department store (ds) or store with supramunicipal impact	Licence or report for authorisation of ds
VALENCIA	Law 3/2011 of 23 March 2011 of the Government of Valencia on Commerce in the Community of Valencia.		Establishments with floor area of more than 2,500 m ² and those with urban planning conditions determined by the Retail Sector Territorial Action Plan of the Valencian Community, if applicable.	Authorisation of the competent regional department for commerce.
EXTREMADURA	Commerce Law 3/2002 of 9 May 2002 of the Autonomous Community of Extremadura.	Law 7/2010 of 19 July 2010 amending the Commerce Law 3/2002 of 9 May 2002 of the Autonomous Community of Extremadura	Establishments with floor area of more than 2,500 m ² .	Mandatory and binding commercial report from the competent department of the regional government.
GALICIA	Law 3/2010 of 17 December 2010 on the Internal Commerce of Galicia		Establishments with floor area or more than 2500 m ² .	Regional retail authorisation granted by competent department for commerce in the region. Exception for establishments dedicated to display and sale of automobiles, vehicles, etc. and for municipal markets and open-air commercial centres.
LA RIOJA	Law 3/2005 of 14 March 2005 Regulating Retailing and Fairs in the Autonomous Community of La Rioja.	Law 6/2009 of 15 December 2009 on Fiscal and Administrative Measures for 2010.	3 types: – in municipalities with less than 10,000 inhabitants, floor area of more than 1,000 m ² . – in municipalities with 10000-25,000 inhabitants, floor area of more than 1,500 m ² . – in municipalities with more than 25,000 inhabitants, floor area of more than 2,500 m ² .	Commercial authorisation as licence from the competent regional government department for commerce for DS establishments or expansions. Notification rules for expansion of less than 20% of facilities already authorised.

Commercial land use planning instruments	Observations	Sundays and holidays (2011)	Specific taxes on dss
Retail Sector Territorial Action Plan of the Valencian Community	<p>The criteria to be taken into account for granting the regional retail authorisation are: Compliance with the criteria of the Sector Action Plan, compatibility of the project with land use planning policy, the proportionality and appropriateness of the establishment and of its commercial use for the urban environment and population, the level of integration of the commercial establishment into the surrounding urban fabric, the sufficiency of adequate public infrastructure and services and integration with means of transport, the project's environmental impact, and its impact on historical, artistic and cultural heritage and on the landscape.</p> <p>Sector Territorial Action Plan pending approval.</p>	8	NO
Criteria for siting collective retail establishments and department stores.	<p>The preparation of the regional report will take into account criteria of territorial cohesion. Aspects to be assessed are the location within the urban environment, mobility, impact on the environment and accessibility and availability or development of parking facilities.</p>	8	NO
Submission to urban planning instruments. If those provisions are insufficient, the competent department for commerce in the regional government can promote sector projects and plans with supramunicipal scope to regulate the establishment of retail outlets.	<p>The grant of the regional retail licence will be based on different criteria considered of public interest. They include a report from the competent regional department for employment matters on the fulfilment of various criteria: balance of family life and work (creation of daycare centres, reading or nursing rooms, etc.), evaluation of impact on labour market and of creation or destruction of jobs in the local community, adoption of measures or commitments for employment stability, number of male and female employees in relation to unit of retail area, and indicators of improvement of quality of service.</p>	8	NO
Special land use plans for large retail establishments.	<p>The criteria considered for obtaining the regional licence include impact on quality of employment, with assessment of permanent contracts, working conditions and employment of hard-to-integrate groups; the protection of consumer rights and interests and the commercial characteristics of the project.</p>	8	NO

Regions	Commerce laws	Latest modification, adaptation services directive	Definition of department store (ds) or store with supramunicipal impact	Licence or report for authorisation of ds
MADRID	Law 16/1999 of 29 April 1999 on the Internal Commerce of the Community of Madrid.	Law 8/2009 of 21 December 2009 on Measures for Liberalisation and Support for Madrid Business.	Floor areas of more than 2,500 m ² .	There are no licensing or prior authorisation requirements. Establishment or expansion requires prior notice to the competent regional department for commerce.
MURCIA	Law 11/2006 of 22 December 2006 on Regulatory Framework for Retailing in the Region of Murcia	Law 12/2009 of 11 December 2009 amending various laws to adapt them to Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.	Types: – individual establishments with floor area of more than 2,500 m ² . – establishments dedicated to sale of used goods with floor area of more than 4000 m ² . – collective establishments with floor area of more than 5000 m ² . – collective retail establishments integrated in outlets that sell variety of products or daily consumer goods with floor area of 2,500 m ² or more, and those that sell used goods with floor area of 4,000 m ² or more.	Regional retail license requested from the competent DG for commerce. Exemption for those cases in which the regional department has already given a favourable report in the urban planning instruments.
NAVARRRE	Law 17/2001 of 12 July 2001 Regulating Commerce in Navarre	Law 6/2010 of 6 April 2010 amending diverse provincial laws to adapt them to Directive 2006/123/EC on services in the internal market.	Establishments with floor area of more than 2,500 m ² .	New DS establishments and expansions of existing ones that increase the floor area by more than 500 m ² are subject to the approval of a Supramunicipal Impact Sector Plan.
BASQUE COUNTRY	Law 7/1994 of 27 May 1994 on Retailing.	Law 7/2008 of 25 June with a second modification of the Law on Retailing.	Establishments with floor area of more than 700 m ² .	A report is required, before the municipal licence is granted, from the competent government body for commerce on the conformity of the planned activity to the criteria of the Sector Land Use Plan.

Source: Prepared in-house using data from: Document of Conclusions on the questionnaire regarding the Impact of Regional Regulations on conditions for the establishment commercial outlets of the Competition Advocacy Working Group (September 2011); Bank of Spain; Boletín de Información Comercial Española (MITYC, August 2011); and Directorate General of Internal Commerce of the MITYC.

Commercial land use planning instruments	Observations	Sundays and holidays (2011)	Specific taxes on dss
No specific instruments are stipulated	Establishment is not subject to any retailing authorisation scheme. Nevertheless, before the relevant municipal licence can be granted, the municipal government will ask the competent bodies of the Madrid regional government for land use planning, environmental protection, and accessibility, as well as the competent regional office for the roadway infrastructure network, to issue a report on the projected activity's conformity with the prevailing sectorial regulations and policies.	22	NO
Urban plan that determines the zoning of retail establishments.	<p>The criteria applied in the regional licensing decision include environmental impact, the impact on public infrastructure and services, proximity to the populace, the outlet's integration in the urban environment and its impact on the landscape and on the historical and artistic heritage.</p> <p>A report must also be obtained from governments of the towns where the project is expected to have impact on the suitability of the planned establishment for developing the retail sector in that municipality or on any other issue for which the municipal authorities have competence.</p>	10	NO
Land Use Plans and the Town General Plans relating to the former.	<p>The Supramunicipal Impact Sector Plan must take into account (apart from the applicable land use planning provisions) the impact of the projected on its urban environment, interterritorial equilibrium, environmental impact and the commercial location and diversity of formats for purposes of ensuring the citizens have the widest possible choices.</p> <p>The Land Use Plans must include general criteria such as preference of locating the retail outlet within urban centres of towns, the complementary infrastructure and relation to residential uses and commercial activities, reduction of the impact the establishment of commercial activities will have on the territory, particularly, on questions of mobility, air pollution, energy consumption and land occupation.</p>	8	Navarre Law 23/2001 of 27 November 2001 creating a tax on large retail establishments.
Sector Land Use Plan for Retail Establishments in the Basque Country Autonomous Community.	<p>The land use planning criteria are not specified. Pending development in the Sector Plan.</p> <p>The municipal plans for transformation of land use to establish large commercial centres or enlargement of urban areas will have regard to the Sector Land Use Plan and will specifically follow land use planning criteria such as: consideration of measures for mobility, effect on traffic and on public mass transit systems, energy efficiency, accessibility and integration with the surrounding community.</p>	8	NO

Tables

Table 1.	Retail selling area by type of activity, in thousands of m ² . 2004-2009	15
Table 2.	Net sales of leading grocery retailing groups, in millions of euros and in %. 2008- 2009	19
Table 3.	Trend in market shares (%) of leading grocery distribution groups 2002-2009	22
Table 4.	Share of total sales area of top operators, by format. 2010	23
Table 5.	Concentration of leading grocery retailing groups by Region. 2010	26
Table 6.	Concentration of leading grocery retailing groups by Region. 2005	27
Table 7.	Market shares of household grocery purchases, by retail format and as % of total sales value. 2009	30
Table 8.	Evolution of packaged food sales by format, as % over total sales. 1994-2010	31
Table 9.	Specialisation of major grocery retailers by format, as % of each company's total sales area. 2010	33
Table 10.	Share of ROBs in sales of top grocery retailers. 2010	40
Table 11.	ROB share as % of volume, by main product categories, with largest and smallest penetration. 2009	42
Table 12.	ROB grocery share as % of sales, by department. 2000 - 2009	44
Table 13.	ROB grocery share, by products with greatest/smallest ROB growth. 2000-2009	45
Table 14.	Percentage of consumers who regularly buy ROBs, by product categories and types of retail outlets. 2009	48
Table 15.	Evolution and impact of relative dependence of manufacturers from 2003 to 2010	60
Table 16.	Business innovation indicators in Spanish food industry companies and in the economy as a whole. 2003-2009	72
Table 17.	Commercial practices between retailers and manufacturers	79
Table 18.	Incidence of commercial payments in Spain according to the suppliers surveyed, by type of payment	87
Table 19.	Incidence of demand for information and copycat conducts	98
Table 20.	Incidence of contract terms and conditions not being set down in written form and of the retroactive modification or breakoff of the contract in Spain according to the respondent suppliers	101
Table 21.	Percentage of ROB suppliers of a retailer who are present in other retailers. 2010	111

Graphs

Figure 1.	Market shares by sales per retailer. 2009	20
Figure 2.	Market shares by sales in Spain according to membership in a group purchasing organisation. 2009	20
Figure 3.	Share (%) of total grocery retailing floor area of the main operators. 2010	21
Figure 4.	Share of total grocery retailing floor area, as %, of the main operators. 2005 and 2010	28
Figure 5.	Evolution of packaged food sales, as % of total sales and according to format (large supermarket, hypermarket, traditional format). 1994-2010	32
Figure 6.	ROB market share in Spanish grocery retailing, as % of total sales. 1990-2009	35
Figure 7.	ROB market shares for fast moving consumer goods in Europe, as % of volume. 2010	36
Figure 8.	ROB market share and concentration in retailing, by country. 2005	37
Figure 9.	ROB share of shopping basket value by format. 2007 - 2009	38
Figure 10.	ROB % share of total grocery sales in the main product departments. 2009	41
Figure 11.	Percentage of consumers who state they do not buy ROB products, by region. 2009	46
Figure 12.	Comparison between the evolution of percentage net margins in retailing in general and in food, beverages and tobacco sold in specialised stores. 2000-2009	63
Figure 13.	Average growth in prices and market share of private labels for 18 product categories in 2000-2009	65
Figure 14.	Market shares in revenue terms, by MB leaders, MB non-leaders and ROB. 2006 and 2010	68
Figure 15.	Evolution of market shares of top four manufacturer brands and private labels in the United Kingdom. 1975, 1997 and 2005	68
Figure 16.	Average annual rate of introduction of new products (total brands), 2003-2010	73
Figure 17.	Average annual rate of introduction of new products (MBs), 2003-2010	73
Figure 18.	Average annual rate of introduction of new products (ROBs), 2003-2010	74
Figure 19.	Comparison of the incidence of the practices between suppliers and retailers (frequency indicator for the practices listed in Table 17)	80

